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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

THE DIAMOND GLUE COMPANY,
Plaintiff in Error,

vs

THE UNITED STATES GLUE COMPANY,
Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF.

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STATEMENT OF THE CASE.

This is a writ of error to the United States Circuit Court for the Southern District of Wisconsin, to review a judgment rendered in favor of the defendant in a suit brought by the Diamond Glue Company, an Illinois corporation, against the United States Glue Company, a Wisconsin corporation, with its principal place of business in the City of Milwaukee. The suit was brought for the breach of a contract, which is set out in the printed record, as Exhibit "3a" on page 75, and was made under the following circumstances:

In June, 1898, and for some time previous there were lo-

cated in and near Milwaukee a number of tanneries, which produced a large amount of glue stock, consisting of "trimmings" from hides that were tanned, and of "fleshings" or scrapings from the inside of the hides. This glue stock the Milwaukee tanners had been accustomed to ship to Chicago and other points for sale to the owners of glue factories. They conceived the idea that it would be to their advantage to organize a glue company and to establish a factory in or near Milwaukee for the manufacture of glue from these "fleshings" and "trimmings" with the purpose, doubtless, of influencing the market for such glue stock, as well as saving the freight on the shipments to Chicago. The United States Glue Company, a Wisconsin corporation, was organized by these Milwaukee tanners for the manufacture of glue from their glue stock. Fred Vogel was President and Albert O. Trostel was Vice-President.

The organizers and members of the United States Glue Company had had no experience in the manufacture or sale of glue, and they, therefore, naturally looked around for advice and assistance. Their representatives talked with officers of the plaintiff, the Diamond Glue Company, with a view to securing the services of the plaintiff company in assisting to launch the new enterprise and in disposing of its product. This was in June, 1898.

The Diamond Glue Company was a corporation of the State of Illinois, with its principal office in Chicago, organized in 1894 by Jonas Spiegel, John R. Morron and Arnold Freshman, who were respectively its president, vice-president and secretary and treasurer. It operated factories in Chicago, Kansas City, Mo., and in Madison, Ind., and in addition sold a large amount of glue for other people, amounting in 1898 to five or six million pounds a year. Its officers were men whose lives had been spent in manufactur-

ing and dealing in glue, and the company was well able to furnish just the sort of assistance that the United States Glue Company required.

It was natural, therefore, that the United States Glue Company should have made overtures to the Diamond Glue Company to secure their aid both in establishing their factory and in disposing of their product. In consequence, on June 22nd, 1898, the United States Glue Company wrote to the Diamond Glue Company (Rec., p. 74), proposing the making of a contract for five years and sending a synopsis of what that contract was to contain.

This proposition was incorporated in a contract made and dated June 25th, 1898, except that the provision in the United States Glue Company's proposition that the Diamond Glue Company should refrain from "making *or handling* either calf or hide glue" was changed to an agreement that the Diamond Glue Company should not manufacture hide or calf glue.

The contract, dated June 25th, 1898 (Rec., p. 75), was between the plaintiff and the defendant. The United States Glue Company, the defendant, agreed thereby to erect, equip and complete a glue factory on a site to be afterwards selected. The Diamond Glue Company agreed to advise and plan with the United States Glue Company's architect, and oversee and supervise the plans of the factory, and give the United States Glue Company the benefit of its labor-saving devices, and their knowledge and experience in the manufacture of glue.

The site for the factory was to be selected within sixty days by the United States Glue Company, and the factory was to be begun and completed with the least possible delay. It was agreed that the Diamond Glue Company should have

"the management of the manufacturing in the said factory," should furnish a superintendent, to whom the United States Glue Company should pay not more than $150 a month; that the officers of the Diamond Glue Company should give "such factory such personal supervision as may be necessary from time to time in the operation of the same, and said officers will give party of the first part in the management and operation of the said factory the benefit of their experience and knowledge."

The contract further provides that the Diamond Glue Company "shall control, handle and sell the entire output, including the glue and by-products of said factory;" that the products should be billed as those of the United States Glue Company; that the Diamond Glue Company, as soon as the factory was in operation, should refrain from manufacturing hide or calf glue in any of its factories, and should guarantee the payment of accounts on any sales made by or through it. It was further agreed that the Diamond Glue Company should receive a commission of 10 per cent. on all sales of glue or by-products, as well as a further small contingent interest in any profits above the stated dividends and amounts for depreciation. As the stockholders were to furnish the new materials, the contract provided that the United States Glue Company should pay a fair market price therefor. The contract was to run for five years.

Immediately upon the execution of this contract the parties set about its performance. The officers of the Diamond Glue Company met the officers of the United States Glue Company at Milwaukee, and together they looked over several sites for the factory, and one was selected early in July, 1898. Even before that the Diamond Glue Company had had some plans drawn, and when Mr. Morron, Mr. Freshman and Mr. Morehead, then with the Diamond Glue Company,

went up to Milwaukee, they took these sketches with them and there met Mr. Finkler, the architect employed by the United States Glue Company. Mr. Finkler and Mr. Bossert, the mechanical engineer of the United States Glue Company, two or three days after this went to Chicago and were shown over the Diamond Glue Company's factory there. Some alterations were made in the sketches and they were completed, and as soon as complete were turned over to the architect, probably in July, for there is a letter (Rec., p. 77) from Mr. Morron, written July 27th, 1898, asking, "Are the specifications for the factory nearly ready?" These facts appear mainly in Mr. Morron's testimony and that of Mr. Morehead. (Rec., pp. 31-60.)

The factory was made unnecessarily large because the Milwaukee tanners made a mistake as to the amount of glue stock they would be able to furnish. (Rec., pp. 54, 56, 61 and 62.) The United States Glue Company's engineer refused to put in sufficient power. (Rec., pp. 58 and 61.) There were unexpected delays by the builders in furnishing material and getting it under way; also on account of excessive amount of rain in the fall of 1898, and excessive cold in the following winter. (Rec., p. 62.) So that the factory was not ready until July 1st, 1899, instead of January 1st, as had been expected. Meanwhile, a lot of glue stock was sent by the Milwaukee tanners to the factory, a good deal of it perishable, and this had to be stored. In storage it necessarily deteriorated. In addition to this, the glue stock was bought at prices above the market because the people who sold it controlled the buying corporation. (Rec., pp. 57, 78, 79, 88.)

All these facts conspired to make the cost of the products of the factory in its early operation much greater than was expected, and served, perhaps, to explain, although not to

excuse, the attitude of the United States Glue Company. The plan of the Milwaukee tanners to use up their own glue stock encountered these obstacles at the start, and so was not as successful financially as expected and they were disappointed. They saw that the Diamond Glue Company was likely to make some money out of selling the glue and had already made some money in selling the grease, a by-product: therefore, they sought to put the blame of their lack of success upon the Diamond Glue Company, thinking both to excuse themselves and to drive a better bargain with the same company or another.

About August 1, 1898, the Diamond Glue Company, in fulfillment of its contract, sent a competent superintendent, Mr. Morehead, up to Milwaukee, to enter the service of the United States Glue Company. From that time until September 1, 1899, when he was succeeded by Mr. Harden, another superintendent sent by the Diamond Glue Company, he remained in the service of the United States Glue Company alone, was paid by it and by no one else, and received his orders solely from the United States Glue Company, although consulting the officers of the Diamond Glue Company from time to time. (Rec., pp. 54, 62, 65.) Early in July, 1899, when the factory was about ready to start up, the Diamond Glue Company sent up their superintendent, Mr. Harden, for a few days to assist Mr. Morehead in starting the work of manufacture. (See Exhibits 12 and 13, Rec., p. 82.) The factory was at all times operated under the direction of the officers of the United States Glue Company, although officers of the Diamond Glue Company occasionally made short trips from Chicago to the factory, which was just outside of Milwaukee, for the purpose of giving advice and assistance. They, however, did not exercise or attempt to exercise any authority over the fac-

tory or any of its operatives. The workmen were employed, paid and discharged by the officers of the United States Glue Company. (Rec., pp. 57, 58 and 65.) An employe of the United States Glue Company kept the books at the factory, and although the Diamond Glue Company's cashier went to the factory for the purpose of making suggestions as to the best method of keeping the books, he had no authority over them and many of his suggestions were not followed. (Rec., p. 69.) This situation was accepted by both companies without question, and both companies assumed that this was according to the contract. The United States Glue Company never asked that the Diamond Glue Company assume control of the factory, nor did the Diamond Glue Company attempt so to assume control. The connection of the two companies after the completion of the factory, and, indeed, during its building, was simply that the Diamond Glue Company did everything it could in the way of furnishing advice, occasionally sending its men up to see how things were getting on at the factory, drawing up plans, etc. The Diamond Glue Company had no one at the factory in its employ, it owned nothing there, kept no books there, nor did any of the raw material, machinery, or finished products belong to it, nor had it any voice in fixing the prices paid for material.

The factory was completed at the end of July or early in August, 1899, and it was immediately put into operation by the United States Glue Company. Its estimated capacity was 3,000,000 pounds of glue and a by-product of grease of about 1,000,000 pounds per year. The Diamond Glue Company received samples of the first lot of glue and grease about the middle of August, and immediately began systematically to seek purchasers for the product. The time was unfavorable for selling a large quantity of glue because the

large consumers usually made contracts covering a year's supply about the beginning of the calendar year (Rec., p. 43), so that the main work—almost the only work, at first—that could be done by the Diamond Glue Company before winter set in, was in selling sample barrels to different consumers of glue who would be in the market toward the end of the year for the next year's supply.

Two methods were open to the Diamond Glue Company for introducing this glue; one was to strictly maintain the prices and gradually and slowly introduce the product. The other was to cut under the prevailing prices for similar qualities of glue in order to more widely and more quickly advertise the product of the United States Glue Company's factory. It was the judgment of the Diamond Glue Company that the former was the best method and this method was afterward insisted upon by the United States Glue Company when, in answering its complaints, the Diamond Glue Company proposed to offer the product at prices which would enable it to dispose of the glue quickly. (Exhibit 25; Rec., p. 91.)

The experience of the Diamond Glue Company, one of the things for which the United States Glue Company expressly bargained, taught its officers that these sample lots of glue were certain to be followed, in many cases, by other orders for large quantities, and at the very time when the United States Glue Company chose to renounce the obligations of its contract, this work of the Diamond Glue Company was beginning to bear fruit. (Rec., p. 99.) Selling these sample lots of the product of a new factory was of course slow and difficult work, compared to the work of selling the product of the same factory after its glue was generally known to consumers. Naturally and necessarily, therefore, the production of the factory outran the sales, and toward

the end of September complaint was made by the United States Glue Company that the glue was accumulating at the factory. (Exhibit 21; Rec., p. 87.) Yet, when it was reminded of the obvious fact that the glue could not be sold at the top of the market and at the same time be sold rapidly, President Vogel answered, on October 28, 1899: "We prefer to hold our stock for fair prices." (Rec., p. 91.) October 14, 1899, Vice-President Trostel complained that the factory had made about 320,000 pounds of glue and only 94,000 pounds had been sold. To which the Diamond Glue Company answered that it was doing all that was possible to sell the glue at the highest market price. It was plainly apparent from correspondence at that time that the United States Glue Company was seeking for a pretext to break its contract, now that there began to be a chance for the Diamond Glue Company to receive its share of the benefits provided in the contract. (Rec., pp. 87 to 102.) Up to this time the Diamond Glue Company had performed a large part of its obligations under the contract, and had received no compensation whatever. It had outlined for the United States Glue Company's architect the plans from which the factory was built and had assisted him in the preparation of plans and specifications; it had advised in the selection of a site, mapped out the arrangement of the equipment, and given constant advice to the officers in the purchase and installation of the equipmnet, and had told them where and how various supplies needed for the glue factory could be best purchased; it had furnished a superintendent, and had sent its bookkeeper to advise in the opening of the factory books.

This advantage the United States Company had obtained; and, in case it was able to find an excuse for breaking the contract, it would have obtained this advantage without

giving anything in return. At least as early as November 1st, the United States Glue Company asked the Diamond Glue Company to release them from the contract, for on November 3rd Mr. Morron wrote to Mr. Vogel, president of the United States Glue Company (Exhibit 26; Rec., p. 91), suggesting on what terms they might be willing to abrogate the contract, and referring to a conversation had with Mr. Vogel some days previous. The receipt of this letter was acknowledged November 15th by the United States Glue Company (Exhibit 26a; Rec., p. 93), and November 16th the Diamond Glue Company offered to take from 100,000 to 200,000 pounds of the "off lots of glue" to reduce the United States Glue Company's stock. (Exhibit 27; Rec., p. 94.)

November 18th Mr. Vogel writes in regard to the contract (Exhibit 28; Rec., pp. 94, 95), that he is waiting for a quorum of the board of directors, stating that as long as the Diamond Glue Company is able to sell the grease, they ought to keep selling the glue at a fair price, and asking for an offer on off-lots of glue. The Diamond Glue Company replied to this letter on the 20th of November (Exhibit 28a; Rec., p. 95), stating that the grease is sold to brokers, and is, therefore, very easily disposed of, and offering to take 375 barrels of glue, to reduce the United States Glue Company's stock, at 12½ cents a pound, less commission.

The same day, so that the letters must have crossed, the United States Glue Company wrote to the Diamond Glue Company in answer to the letter of November 3rd (Exhibit 29; Rec., pp. 96, 97), stating that they are not endeavoring to cancel the contract in order to enter into an arrangement "more profitable or more beneficial to themselves," (though

it is hard to see what other object they could have had) and implying that even if this contract is abrogated, *another contract might be made with the Diamond Glue Company.* (Page 96.) The letter recites that only 22% of the glue made had been sold, complains that the manufacturing cost was greater than was represented by the Diamond Glue Company, and says that unless this difficulty was remedied the works would have to close, and therefore, the United States Glue Company had only a choice of having the factory closed or the contract ended. The latter contained no definite answer to Mr. Morron's letter of the 3rd. (Page 91.) On November 25th the United States Glue Company rejected the offer of the Diamond Glue Company to buy 375 barrels of glue.

November 27th the Diamond Glue Company sent in their usual method (Exh. 32a, Rec., p. 99) to the United States Glue Company several orders, one for 100 to 125 barrels, one for five barrels each month, with the privilege of increasing to twelve barrels after January 1st, 1900, for a year; one for 60 to 75 barrels to be taken in monthly shipments during 1900, as well as two small orders, in all between 227 and 346 barrels. These orders were obtained by the Diamond Glue Company as sales agent for the United States Glue Company.

The next day, November 28, the United States Glue Company replied (Exh. 33, Rec., pp. 99, 100), declining to recognize the contracts for future delivery on the ground that the continuance of the contract was uncertain. The letter ends with a definite request that until further arrangements the Diamond Glue Company should cease selling the United States Glue Company's products.

A further letter of December 2nd (Exh. 34, Rec., p. 100) acknowledges certain orders sent in by the Diamond Glue

Company, states a willingness to fill them and allow a 10 per cent. commission, etc., and states that the United States Glue Company "will be pleased to receive orders from you and allow the same commission until further notice on such orders as seem to be proper to be filled," repeating the request that the Diamond Glue Company cease to make sales for future delivery, and stating that the agreemnt is at an end, and that the United States Glue Company cannot recognize any orders as coming within or being governed by the agreement. On December 4th, 1899, the United States Glue Company offered to pay $5,000 as a settlement of the matter. (Exh. 35, Rec., pp. 100, 101.) On December 5th, the Diamond Glue Company wrote (Exh. 36, Rec., p. 101):

"This company denies your right to do this, and insists that you cannot thus arbitrarily terminate it merely because you desire more favorable terms than we both agreed to when the contract was made.

"Before deciding what action to take with reference to your offer, we would like to know what you mean by your claim that we are guilty of 'various breaches of the said contract.' We have kept our agreement in good faith, and if we are to be deprived of its benefits we ought to be notified explicitly of the reasons for the action." (Exh. 36, Rec., p. 101.)

On December 7th the United States Glue Company replied (Exh. 37, Rec., pp. 101, 102):

"You suggest, as you have suggested before, that our action is arbitrary and based simply on a desire to secure more favorable terms than were agreed upon when the contract was made. We again state to you, as we have before stated, that this action on our part is not arbitrary, nor is it based on any desire to secure more favorable terms. Our action is, in our judgment, based on good and sufficient legal grounds, and, among other reasons, goes upon breaches of the contract by you and failure on your part to perform."

February 5th, 1900, the Diamond Glue Company brought its action against the United States Glue Company in the

United States Circuit Court for the Eastern District of Wisconsin. A complaint was filed which was afterward amended. The allegations of the amended complaint (Rec., p. 22) are in substance as follows:

That the Diamond Glue Company is an Illinois corporation with its principal offices in Chicago, and the United States Glue Company a Wisconsin corporation with its principal offices in Milwaukee, in the Eastern District of Wisconsin.

That on and prior to June 25th, 1898, the Diamond Glue Company was engaged in manufacturing, buying, selling and dealing in glue and by-products; that it had factories in Illinois, Indiana and Missouri, and that it had branch offices for carrying on its business in New York, Boston, Philadelphia, Toronto and other places, and that it was extensively engaged in the manufacture of glue and by-products and the sale of same, both from its own factory and from the factory of others in the various parts of the United States; all of which was known to the defendant and its officers.

That the Diamond Glue Company at that time had had large experience in the construction and operation of factories for the manufacture of glue and the supervision and management of the same, and that its officers then possessed knowledge and experience in the construction and management of such factories, and in the sale and disposal of their products, and also in selling raw material for their manufacture, and that it possessed large facilities for selling and disposing of glue.

That the defendant had been organized for the purpose of buying from the various tanners in and around Milwaukee the glue stock turned out by said tanners and manufacturing said glue stock into glue in a factory to be erected in or near Milwaukee, and that the defendant made contracts with nearly all the tanners in Milwaukee to take and pay for all their glue stock for a period of at least five years from the date of the construction of the defendant's factory; that the sole object of the organization of the defendant was to enable the Milwaukee tanners to dispose of their glue stock to a corporation controlled by themselves and

that all the capital stock of the defendant was held by Milwaukee tanners.

That on June 25th, 1898, the contract above set forth was made between the plaintiff and defendant; that after the making of said contract the defendant selected a site for its glue factory near Milwaukee and proceeded to erect and equip the factory, and that the plaintiff advised and planned with the defendant's architect and supervised the plans of the factory so as to secure economy of space and give the defendant the benefit of all the plaintiff's labor-saving devices, as well as of the knowledge and experience it had acquired in the manufacture of glue; that said factory was put into operation about July 25th, 1899, and the plaintiff immediately refrained and has at all times since refrained from manufacturing hide or calf glue at any of its factories that it had refitted one of them for the manufacture of other kinds of glue, and leased it to other parties; that the plaintiff had at all times been ready and willing to perform the terms and conditions of the contract and had in all respects fully complied with said terms and conditions to be performed on its part.

That the defendant, upon the completion of the factory, entered into the management of the manufacturing therein and operated the same, and that plaintiff furnished a capable superintendent, according to the contract, whose salary was paid by the defendant, and that plaintiff, through its officers, at all times gave defendant in the operation of the factory until the breach of the contract the benefit of its experience and knowledge, and that of its officers; that as soon as any were made the plaintiff sold all the glue and by-products of said factory which it was able to dispose of until said breach; and that all such products were sold as the defendant's product, but were stamped "Diamond Glue Company, exclusive sale agents." That all such sales were made by the plaintiff outside of the State of Wisconsin, and that the shipments of the product of the factory were made by the defendant, less than one per cent. of such shipments being made to places in the State of Wisconsin.

That the defendant in many cases refused to accept the prices obtained by, or offered by the plaintiff for the sale of such glue and by-products, and asserted the right to refuse to carry out sales made by the plaintiff in case the defend-

ant's officers did not think the price high enough, and in many cases actually did so refuse.

That the contract was continuously recognized by the defendant as a binding contract until about November 20th, 1899, when the defendant, claiming that the plaintiff had agreed to sell defendant's entire output and that it had failed to do so, asserted a right to treat the contract as at an end, and about November 28th, 1899, requested the plaintiff to cease selling its product, and December 2nd, 1899, definitely stated to plaintiff that the contract was at an end and refused to be further bound thereby.

That there is due and owing to the plaintiff from the defendant $1,698.48 on account of commissions on sales under the contract.

That the services done by the plaintiff to the defendant in planning, overseeing and supervising the construction of the factory and in giving the defendant the benefit of its labor-saving devices and its knowledge and experience were of very great value to defendant; that plaintiff sustained great loss in closing down its factories in the manufacture of hide and calf glue and in procuring customers for the defendant and refraining from the manufacture of hide and calf glue, for none of which it had been paid.

That the output of said factory would amount to at least 3,000,000 pounds of glue and 1,500,000 pounds of grease a year, and that the plaintiff has been deprived of its commissions in the selling of this product, to the plaintiff's damage in the sum of $200,000.

The answer of the United States Glue Company (Rec., p. 7), was to the following effect:

It admits the making of the contract and sets it out in full. Denies that the plaintiff was authorized by its charter to superintend the construction of the factory or to act as broker, factor or sales agent or to make or carry out the contract.

Alleges that defendant prior to the first day of September, 1898, transacted no business except with its own members, except partially planning the factory, and making certain contracts relating thereto. And alleges that all the acts done by the plaintiff under the contract were done by it after September, 1898, and that it, the plaintiff, has not

complied with Section 1770b of the Revised Statutes of Wisconsin, and that, therefore, all the acts done by the plaintiff were done in violation of the laws of Wisconsin and the contract was wholly void on behalf of the plaintiff.

Alleges that the plaintiff induced defendant to enter into said contract and represented that defendant would be able to manufacture glue at a maximum cost of 2½ cents per pound, and that this was on account of the plaintiff's wide experience, etc.

Admits that the defendant was organized by the tanners for the purposes alleged in the complaint.

Alleges that the said plaintiff has never been able to make the factory produce glue at a manufacturing cost of less than 3½ cents per pound, and that this arises, either because the representations of plaintiff were false or because an incapable superintendent was furnished the defendant, or from negligence of the plaintiff in planning and equipping the factory.

Alleges that plaintiff improperly and insufficiently planned and equipped the factory so that much glue-stock was lost and the glue, when manufactured, was of less value than it otherwise would have been.

Alleges that up to December 1, 1899, plaintiff "unmindful of the obligation which it had assumed to sell the entire output of the factory," failed and refused to sell more than 19% of the output of glue and that plaintiff was powerless to sell any larger proportion then, or in the future; that plaintiff was engaged in selling the glue from other factories owned or controlled by it, and sold such output to the neglect of the defendant's output in violation of the contract, and refrained from attempting to sell defendant's output and betrayed and neglected defendant's interests and subordinated them to adverse interests in favor of plaintiff and used defendant's output for the purpose of manipulating the market for plaintiff's profit, and neglected to perform its duty as defendant's sales agent.

Alleges that plaintiff so managed the manufacture and sale of the product that a constant loss was imposed upon the defendant. That the cost of manufacture was greater than it should have been. That the prices obtained by the plaintiff were uniformly under the market price and below

actual cost. That every day the plaintiff continued in control of said factory and its products great money loss was entailed upon the defendant because plaintiff was selling the product at less than the cost of production.

Admits that about December 1, 1899, defendant notified plaintiff it no longer recognized the existence of the contract.

Denies that it ever refused to recognize sales made by the plaintiff but alleges that it refused to sell its product direct to the plaintiff.

Denies that plaintiff closed its factories or fitted any of them for the manufacture of other kinds of glue. Alleges that it leased one of its factories and through its tenants continued to manufacture a mixed glue and control the output of said factories, composed of hide glue and bone, and alleges that plaintiff made a contract with the Gaenzlein & Fischer Glue Company, of Gowanda, New York, to take the factory of said company and said plaintiff manufactured hide and calf glue and subordinated the interests of the defendant to those of the plaintiff.

Admits that the unpaid commissions not yet due amount to $1,639.13. Denies that plaintiff has suffered any loss from the breaking of the contract.

Denies that the factory would have produced any amount of glue or grease if the agreement had continued in force, and alleges that the commissions provided for in said agreement would have been consumed in the expenses attending the making of sales.

The defendant added to its answer counter claims amounting to sixty thousand dollars; to which a reply was filed by the plaintiff. The counter claims were not considered at the trial.

The case came on for trial at Milwaukee, before the Honorable WILLIAM H. SEAMAN, Dist. Judge, in February, 1901.

The plaintiff's testimony showed a compliance by it with the terms of the contract; that it had, immediately upon the beginning of the manufacture of glue in the defendant's

factory, sent samples of the glue to its traveling salesmen and put its machinery in motion to find a market for the glue; that it had sold, in sales of a few barrels apiece; a large amount of the glue, and that just before the termination of the contract by the defendant the plaintiff had begun to get in large orders for quantities of 100 barrels, or thereabouts, to be delivered at various times during the ensuing year (see Exhibit 32a; Rec., p. 99), so that the prospect was that had the defendant abided by its contract the plaintiff would soon have been selling its entire output. The testimony also shows that all the grease produced by the factory was sold by the plaintiff about as soon as it was turned out and that the grease was much more quickly salable than the glue. (Rec., p. 44.)

At the close of the plaintiff's testimony the court, without compelling the defendant either to proceed with its defense or to rest, allowed it to introduce a stipulation that the plaintiff had not complied with Section 1770b, of Wisconsin Statutes of 1898, and thereupon instructed the jury to find a verdict for the defendant.

The only defense, of the numerous ones set up in the defendant's answer, which the court upheld, was the defense based on said Section 1770b. (Rec., p. 110.) Said statute was as follows:

"Filing Articles; Process; Forfeiture; Contracts. Section 1770b. No corporation, joint stock company, express company or common law partnership incorporated or organized otherwise than under the laws of this state, except corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity, upon the mutual or assessment plan, shall transact any business or acquire, hold, or dispose of property in this state until such

association, company, partnership or corporation shall have caused to be filed in the office of the secretary of state a duly authenticated copy of its charter, articles of association or incorporation or of copartnership and all amendments thereto which may be made while it shall continue to do business therein. Such association, company, partnership or corporation causing a copy of its charter or articles to be so filed shall thereby be deemed to have made, constituted and appointed the secretary of state its true and lawful attorney upon whom all summonses, notices, pleadings or process in any action or proceeding against it may be served in respect to any liability arising out of any business, contract or transaction in this state and thereby to have stipulated that service thereof upon the secretary of state or his assistant shall be accepted irrevocably as a valid service upon it; and such appointment and stipulation shall continue in force irrevocably so long as any liability of such association, company, corporation or partnership remains outstanding in this state. Actions may be brought against any such association or partnership in the name by which it is commonly known. Whenever any such summons, notice, pleading or process shall be so served, the secretary of state shall forthwith mail a copy thereof postage prepaid and directed to such association, company, corporation or copartnership at its principal place of business, or if it be organized in a foreign country, then to its resident manager in the United States, and also an additional copy to such association, company, corporation or copartnership at its foreign address, or in any such case to such other person as may have been previously designated by it by written notice or request filed in his office. The failure to comply with any of the provisions of this section shall for the first such violation subject the association, company, corporation or copartnership or any agent, officer or person acting for it in this state, to a penalty of five hundred dollars, to be sued for and recovered in the name of the state, with the cost of prosecution by the district attorney of any county in which it or any of its agents or officers shall be located or reside or transact, or attempt to transact, any business; and such penalty, when recovered, shall be paid into the treasury of the county for the benefit of the school

fund. Every subsequent violation of any such provisions shall subject such association, company, corporation or copartnership, or of any of its agents or officers guilty thereof, to a penalty of not less than one thousand dollars, to be sued for, recovered and disposed of in like manner. Every contract made by or on behalf of any such association, company, corporation or copartnership affecting the personal liability thereof, or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf, and on behalf of its assigns, but shall be enforceable against it or them. In case any joint stock company, association or copartnership shall not have any articles of incorporation, organization, association or copartnership, it shall file in the office of the secretary of state, under the seal, if any, of the company or partnership, and under the signature of two of its principal officers, and in case of a partnership, under the signature of any member thereof, a written instrument appointing the secretary of state an attorney for the purpose of receiving service of summons, notice, pleading and process as aforesaid, and stipulating that the service thereof shall constitute personal service upon it; and be subject to like penalties for failure to comply with this provision as hereinbefore provided in case of a failure to file such articles. For filing such articles, every such association, company, corporation or partnership shall pay to the secretary of state twenty-five dollars, and for amendments thereto ten dollars." (Sandborn & Berrymans Rev. Stat. of Wis., 1898, page 1279.)

This is one of the sections of the Revised Statutes which were enacted at the adjourned session of the Legislature commencing August 17th, 1897. Section 4978 thereto provided that these statutes should take effect as follows:

"*These statutes shall take effect and go into operation on the first day of September in the year 1898, and on and after said day the Revised Statutes of the year 1878, Sanborn & Berrymans Annotated Statutes, * * * shall be repealed.*" (Id., p. 2917.)

It will be observed that the contract, for the breach of which action was brought, was made June 25th, 1898, and

its performance was at once begun before this statute went into operation.

In 1899 the Wisconsin Legislature, realizing that this Section 1770b was unconstitutional, amended it by leaving out the words *partnership* and *copartnership* and by abolishing the fine for repeated violations. (Session Laws of Wisconsin, 1899, Chap. 351, Sec. 27.) This amendment cannot in any wise affect the contract, because the contract was executed before its enactment.

To reverse the judgment entered on the directed verdict this writ of error was sued out.

Concerning this Wisconsin statute the plaintiff in error contends:

1. That it was void because a violation of the provisions of the Federal Constitution guaranteeing to the citizens of other States privileges and immunities of the citizens of Wisconsin, and the equal protection of the laws.

2. That such statute, if held applicable to the contract in question, was likewise unconstitutional and void as impairing the obligations of an existing contract.

3. That because the contract was made in June, 1898, and the statute did not become effective until September, 1898, the court erred in giving it a retro-active effect so as to make it limit the performance of a prior contract; and the language of the statute itself indicates no legislative intent to enable parties to a contract made before the statute was effective to escape the obligations of such contract.

4. That the statute, if held applicable to the contract in question, was likewise void as an attempted regulation of interstate commerce.

5. That the plaintiff in error had done nothing in performance of the contract to bring itself within the penal pro-

visions of that statute, and therefore the statute, whether constitutional or not, furnished no defense to the enforcement of the contract.

6. That if the defendant in error had, either under the provisions of the statute or the terms of the contract, a right to cancel the contract in question, it had clearly waived such right by its conduct.

7. That the defense of the statute in no possible view met the plaintiff in error's claim for commissions admittedly earned by the plaintiff in error by the selling of goods outside of the State of Wisconsin prior to its cancellation by the defendant in error.

All these questions were necessarily decided against plaintiff in error by the court in directing a verdict for the defendant. To this action of the court exception was duly taken. (Rec., p. 111.) The constitutional questions were presented to the court, not only in the argument of the demurrer to the answer but also in the argument preceding the giving of the peremptory instruction (Rec., pp. 109 and 110), and also in the particular exceptions taken. (Rec., pp. 111 and 112.)

SPECIFICATIONS OF ERROR RELIED ON BY PLAINTIFF IN ERROR.

1. The Circuit Court erred upon the trial of said action in granting the motion of the defendant and directing a verdict for the defendant.

2. Said Circuit Court erred in holding that the certain statute of the State of Wisconsin described in the answer of the defendant in error, being Section 1770b of the Wisconsin Statutes of 1898, was sufficient in law for a defense to said action of said plaintiff in error.

3. Said Circuit Court erred in refusing to hold that said

statute referred to and set out in the defendant's answer was void and inoperative, because contrary to the provisions of Section 2, Article 4, of the Constitution of the United States, providing that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several states.

4. Said Circuit Court erred in refusing to hold that said statute referred to and set out in the defendant's answer was void and inoperative, because contrary to the provisions of the 14th amendment of the Constitution of the United States, providing that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States nor deny to any person within its jurisdiction the equal protection of the law.

5. Said Circuit Court erred in refusing to hold that said statute of the State of Wisconsin referred to and set out in the answer of defendant in error was and is void and inoperative, under Section 10, of Article 1, of the Constitution of the United States, as a law impairing the obligation of the contract sued upon by the plaintiff in error.

6. Said Circuit Court erred in refusing to hold that the statute referred to and set out in the answer of the defendant was and is void and inoperative as to the plaintiff in error's said cause of action, because contrary to, and an infringement of Section 8, of Article 1, of the Constitution of the United States, inasmuch as the effect of said statute as applied by said Circuit Court to said plaintiff in error's cause of action, as shown by the evidence, was a regulation of or an attempt to regulate commerce between the several states, to wit: the interstate commerce between the said plaintiff in error and the defendant in error, and between the said plaintiff in error and the various persons with whom it transacted and would have transacted interstate commerce under said contract.

7. Said Circuit Court erred in refusing to hold the said statute referred to and set out in the answer of the defendant in error was void and inoperative as to the plaintiff in error's cause of action, as shown by the evidence, because the transactions between the said plaintiff in error and said defendant in error, and between said plaintiff in error and the various parties with which it had transacted, and would have

transacted business under the terms of said contract set out in the plaintiff's amended complaint, were interstate commerce.

8. Said Circuit Court erred in holding that said statute of Wisconsin, to wit: said Section 1770b of Wisconsin statutes of 1898, applied to or covered the said contract between said plaintiff in error and said defendant in error.

9. Said Circuit Court erred in holding that said Section 1770b of the Wisconsin statute of 1898, applied to or covered the actions and transactions of said plaintiff in error under and in pursuance of said contract, as said contract and said actions and transactions appeared from the evidence upon the trial of said cause.

10. Said Circuit Court erred in holding that said contract, as described in the complaint of the plaintiff in error and the actions of the plaintiff in error under and in the performance of said contract as the same appeared from the evidence, were in violation of, and were contravened by the prohibition of said Section 1770b of the Wisconsin statutes of 1898.

11. Said Circuit Court erred in refusing to hold upon defendant's motion for a peremptory instruction that the defendant by its acts and conduct in the premises as shown by the evidence had waived the right, if any it had, to set up said statute of Wisconsin as a defense to or excuse for the breach of said contract.

12. Said Circuit Court erred in applying the provisions of the statute of Wisconsin as set out and referred to in defendant's answer, said statute being no longer in force as in said answer set out at the time of the breach by the defendant of the contract sued on.

13. Said Circuit Court erred in permitting the counsel for the defendant in error to move for a direction of a verdict in favor of the defendant in error without first resting his cause.

BRIEF.

I.

The provisions of the Wisconsin Statute concerning Partnerships, joint stock companies and unincorporated associations are void, being in conflict with Section 2, Article 4, of the United States Constitution and with the Fourteenth Amendment; therefore, as the act had but a single purpose—to impose special conditions on all foreign business concerns alike—the whole act must fall.

Bank of Augusta v. *Earl,* 13 Peters, 517, 586.

Paul v. *Virginia,* 8 Wallace, 168, 177.

Barnes v. *People,* 168 Ill., 425, 430.

Allen v. *Louisiana,* 103 U. S., 80, 83.

Slauson v. *Racine,* 13 Wis., 398, 404.

Poindexter v. *Greenhow,* 113 U. S., 270, 304.

Trade Mark Cases, 100 U. S., 82.

Pollock v. *Farmers Loan & Trust Co.,* 158 U. S., 601, 635.

Cooley on Constitutional Limitations, Page 178.

Rev. Stat. 1898, Wis., Sections 1770b (*supra.*)

Laws of Wisconsin, 1899, Ch. 351, Section 27.

II.

The Wisconsin Statute, if it affords a defence to the action on this contract, is in so far unconstitutional as impairing the obligations of the contract.

Walker v. *Whitehead,* 16 Wallace, 314, 317, 318.

Peninsular L. & C. W. v. *Union O. & P. Co.,* 100 Wis., 488, 496.

Winter v. *Jones,* 10 Ga., 190, 195.

Robinson v. *McGee,* 9 Cal., 81, 84.

Austin v. *Burgess,* 36 Wis., 186, 195.

Green v. *Biddle,* 8 Wheat., 1, 84.

Hope Mut. Insurance Co. v. *Flynn,* 38 Mo., 483.

Fletcher v. *Peck,* 6 Cranch, 87, 137.

Statutes are never retroactive unless clearly so intended. A statute enacted at one time, to go into force at another, is to be deemed for all purposes as enacted at the later time, and need not be regarded by any one until that time.

Sedgwick on Statute Law, Page 83.

Endlich on Interpretation of Statutes, Sec. 499.

Bishop on Written Law, Sec. 31.

Wade on Retroactive Laws, Sec. 33.

Dewart v. *Purdy,* 29 Pa. St., 113, 117.

Encyclopedia of Law, 1st Ed., Vol. 23, Page 218.

Commonwealth v. *Fowler,* 10 Mass., 290, 300.

Jackman v. *Garland,* 64 Me., 133, 136.

Sammis v. *Bennett,* 32 Fla., 458, 460.
Larrabee v. *Talbott,* 5 Gill. (Md.), 426.
Ex parte Eames, 2 Story, 322, 325.
Charless v. *Lamberson,* 1 Iowa, 435, 445.
Rice v. *Rudiman,* 19 Mich., 125, 135.
State v. *Messmore,* 14 Wis., 163, 175.
State v. *Bond,* 49 N. Car., 9.

Therefore, a contract made between the enactment and going into effect of a statute cannot be affected by the statute. Such an effect would impair the obligations of the contract.

Mix v. *Vail,* 86 Ill., 40, 44, 45.
Security Sav. Ass'n v. *Elbert,* 153 Ind., 198, 203.
National B. & L. Ass'n v. *Black,* 153 Ind., 701.

III.

The contract between the parties related to and covered inter-state commerce, and, therefore, was protected against the application of the Wisconsin statute.

Cooper Mfg. Co. v. *Ferguson,* 113 U. S., 727, 736, concurring opinion.
McCall v. *California,* 136 U. S., 104, 108.
Robbins v. *Shelby, Tax District,* 120 U. S., 489, 494.
Corson v. *Maryland,* 120 U. S., 502.
Milan M. & M. Co. v. *Gorten,* 93 Tenn., 590.
Printed Record, pp. 41, 42, 44, 45.

IV.

No legislative intent is shown in this statute, properly construed, to release of the United States Glue Company from performance of its contract.

Aetna Life Ins. Co. v. *Harvey,* 11 Wis., 394.
Harris v. *Runnels,* 12 Howard, 79, 84, 85.

V.

The contract as construed by the parties did not require the plaintiff in error to do business in Wisconsin; where parties to a contract have by their acts put a practical working construction on it, the court will follow such construction.

Chicago v. *Sheldon,* 9 Wallace, 50, 54.
Lumber Co. v. *Stump,* 30 C. C. A., 260, 264.
Winchester v. *Glazier,* 152 Mass., 316, 323.
Topliff v. *Topliff,* 122 U. S., 121, 131.
Printed Record, pp. 57, 59, 62, 69, 76.

VI.

The plaintiff's acts under the contract were not "doing business" in Wisconsin, as forbidden by the statute.

United States v. *American Bell Telephone Co.,* 29 Fed., 17, 38.
American Loan & Trust Co. v. *E. & W. Ry. Co.,* 37 Fed., 242, 245.
Kilgore v. *Smith,* 122 Pa. St., 48, 57.
Thompson on Corporations, Vol. 6, Par. 7936.

Scruggs v. *Scottish Mortgage Co.*, 54 Ark., 566.

Morgan & Co. v. *White*, 101 Ind., 413, 414.

Beard v. *U. & A. Publishing Co.*, 71 Ala., 60, 62.

Sullivan v. *Lumber Co.*, 103 Ala., 371.

Cooper Mfg. Co. v. *Ferguson*, 113 U. S., 727.

Utley v. *Clark-Gardner Mining Co.*, 4 Col., 369.

St. Louis W. M. Co. v. *Consolidated B. W. Co.*, 32 Fed., 802.

Printed Record, pp. 45, 57, 62.

VII.

The alleged violation of the statute by the Diamond Glue Company had no connection with the breach of the contract by the United States Glue Company for which suit was brought. If, under the statute, the United States Glue Company had the right to repudiate the contract, it waived that right by its conduct.

Weeks v. *Robie*, 42 N. H., 316.

Lawrence v. *Dale*, 3 John., Ch. 23, 42.

Herman on Estoppel, Vol. 2, §§ 1039, 1040, 1043, 1046.

Genoa v. *Van Alstine*, 108 Ill., 555.

Printed Record, p. 85.

VIII.

The Diamond Glue Company in its dealings with other corporations did not break its contract with the United States Glue Company.

Printed Record, pp. 50, 52, 53, 74, 75.

IX.

Even if the plaintiff were not entitled to recover damages for the defendant's refusing to abide further by the contract, nevertheless, the instruction given to the jury was wrong, for the plaintiff showed a cause of action for the value of services rendered by it to the defendant.

Printed Record, pp. 15, 26, 52, 103-106.

ARGUMENT.

I.

The Wisconsin statute is unconstitutional and void—it conflicts with Section 2, Article 4, of the United States Constitution and with the Fourteenth Amendment.

The learned judge's direction is based solely upon the Wisconsin Statute pleaded in the United States Glue Company's answer. (*Supra*, p. 18.) The statute, as there pleaded, is the original statute which was enacted in August, 1897, but which was not to "take effect" or "go into operation" until September 1, 1898.

It will be observed that this statute provides for five things:

1. That every corporation, joint stock company, association or partnership not formed under the laws of the State of Wisconsin shall, before doing business in Wisconsin, file certain papers in the office of the secretary of state, appointing the secretary of state its attorney for the service of process.

2. That any corporation, partnership, etc., which has not complied with such directions shall not transact any business, or acquire, *hold or dispose* of any property in the state *until* it has complied with such provisions.

3. The secretary shall mail a copy of any service of process served on him to the corporation, etc.

4. That the failure to comply with any of the provisions of the act as aforesaid (apparently including the failure of the secretary of state to comply therewith)

shall "subject the association, company, corporation or co-partnership, *or any agent, officer or person acting for it in this state*" to a penalty.

5. That every contract made by or on behalf of any such corporation, partnership, etc., before it shall have complied with the provisions of this section shall be wholly void on its behalf, but enforceable against it or them.

This section of the statute pleaded by the defendant applied indiscriminately to corporations, common law partnerships, common law joint stock companies and associations of all kinds (except charitable, religious and insurance companies), whether organized under the provisions of any statute of another state or country or the federal government or not. That is, whether they had what is ordinarily called a charter or whether they existed simply as a voluntary association under common law principles of two or more individuals.

It is well settled that a state may impose what conditions it sees fit upon corporations formed by other states which seek to do business within its limits. This is because a corporation is not a citizen or merely an organization of citizens, but an artificial person existing only at the will of the sovereign and by virtue of its charter.

Bank of Augusta v. *Earle,* 13 Peters, 579, 587.

Paul v. *Virginia,* 8 Wallace, 168, 177.

It is equally well settled that a State cannot deprive citizens of other States of the right to do business within its borders, either individually or as a partnership, or subject them to any other or different requirements as to the manner of their doing ordinary business than are imposed upon its own citizens.

United States Constitution, Article 4, Section 2.

Barnes v. *People*, 168 Ill., 425, 430.

In the last case Barnes was fined under a statute of Illinois which prohibited any one from acting as agent for foreign insurance concerns without first obtaining a license. It appeared that Barnes was acting as an agent for several unincorporated "Lloyds" associations, composed of citizens of New York. It was held that if the law applied to the transactions of such citizens in Illinois, it was unconstitutional. The court says (page 430):

"The provision in question is against the citizens of other States merely and solely because they are not citizens of this State. It draws a line between them and our own citizens based on residence, and abridges a privilege freely allowed to our own citizens. * * * A discrimination directed only against underwriters residing without the State is invalid."

It has not been asserted that there is or ever was a statute of Wisconsin requiring a partnership or any voluntary association of Wisconsin citizens to file with the secretary of state an authorization that process may be served on him for them, or to pay a fee of $25.00, or any other sum, for so doing. Such being the case, it is obvious that the act above quoted from is unconstitutional so far as it applies to copartnerships or other voluntary associations of citizens of other States than Wisconsin. The unconstitutionality of so much of the statute must extend to the whole act.

The evident purpose of the act was to impose on all concerns consisting of more than one person, whether existing for business or for pleasure—as long as the aims were not religious, charitable or for insurance—a condition of filing certain papers with the secretary of state, paying him $25.00 and agreeing that he should be their agent for the

service of process before they were allowed to hold any property in Wisconsin or to do any business there. There is no mere inadvertent linking of partnerships with corporations. The desire of the legislature was to treat all alike, partnerships, associations and corporations, and its enactment in putting this desire into effect violates the United States Constitution. This court is not at liberty to attribute to the legislature any purpose which is not apparent in its enactments; therefore, the purpose there apparent being illegal, the enactment must fall.

The case of *Allen* v. *Louisiana*, 103 U. S., 80, is in point. There the court say (page 83):

"It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. 'But,' as was said by Chief Justice Shaw in *Warren* v. *Mayor and Aldermen of Charleston*, 2 Gray (Mass.), 84, 'if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other as to warrant a belief that the *legislature intended them as a whole*, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature.

Justice Cooley in his "Constitutional Limitations" (page 178) says:

"If its" (the statute's) "purpose is to accomplish a single object only, and some of its provisions are void, the whole **must fall, unless sufficient remains to effect the object** without the aid of the invalid portions."

The law of Wisconsin is to the same effect. *Slauson* v. *Racine,* 13 Wis., 398, 404, involved a statute annexing certain land to the City of Racine. Provisions as to the taxes on these lands were unconstitutional and the court, on the ground that these provisions were intended as compensations for the annexation and that striking them out would leave a law not expressing the legislative purpose, held the whole act must fall, citing *Warren* v. *Mayor and Aldermen of Charleston, supra.*

There is in this Section 1770b no separation of any sort between the provisions applicable to corporations and those applicable to partnerships, associations or joint stock companies. At the commencement of the act, indeed, corporations was the first word used; a little further down we find "association, company, partnership or corporation." Again "association, company, corporation or partnership." There is throughout the act no separation of the incorporated from the unincorporated bodies, except, indeed, in one or two specific provisions as to the *latter.* For instance: That action may be brought against "any such association or partnership in the name by which it is commonly known," and "In case a joint stock company, association or copartnership shall not have any articles of incorporations, organization, association or copartnership, it shall file in the office of the secretary of state under the seal, if any, of the company or partnership, and under the signature of two of its principal officers, and in case of a partnership under the signature of any member thereof, a written instrument," etc.

If anything is obvious in reading over this statute, it is that it was the legislative intent to put into one class all foreign corporations, unincorporated associations and joint stock companies, and even ordinary partnerships, subject to a law

operating uniformly as to all, and that there was great care in drafting the act to make its provisions include unincorporated as well as incorporated bodies. In other words, the addition of unincorporated associations and partnerships was not incidental to the main idea of imposing conditions on corporations, but the principal idea was, while imposing conditions, to treat all concerns originating outside of the State and consisting of more than one person alike. Consequently, there is no excuse for asserting that, although the act is unconstitutional in regard to partnerships and voluntary associations, it can be still applied to corporations. To do so would violate the legislative intent. It would draw distinctions in the treatment of various classes of joint undertakings which the legislature painstakingly shows its purpose to treat alike.

The case of *Poindexter* v. *Greenhow*, 114 U. S., 270, 304, is particularly in point. The court there says:

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fall. *To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact.* An illustration of this principle is found in the *Trade Mark Cases*, 100 U. S., 82, where an Act of Congress, which, it was claimed, would have been valid as a regulation of commerce with foreign nations and among the states, was held to be void altogether, because it embraced all commerce, including that between the citizens of the same state, which was not within the jurisdiction of Congress, and its language could not be restrained to that which was subject to the control of Congress. 'If we should,' said the court in

that case (page 99), 'in the case before us undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do.' "

Poindexter v. *Greenhow* was cited with approval and followed in the late case of *Pollock* v. *Farmers Loan & Trust Company*, 158 U. S., 601, 635. There, the court held the income tax invalid so far as it applied to income in the nature of rents from real and personal property, and for that reason held the entire tax invalid even as applied to other sources of income. That case is certainly no stronger than the present. There, the reason for holding that the act could not be divided and that part enforced which would have been constitutional if enacted alone, was that the scheme of taxation must be considered as a whole. But there is no indication in the income tax act, except in the lumping together of all kinds of income, that it was the controlling desire of Congress to treat all sources of income alike; whereas, in the act now before the court, as has been pointed out, it was the evident intention to treat partnerships, voluntary associations and corporations all in precisely the same way, as is manifested not only by their being lumped together, but also by the care with which the provisions, applied in similar acts of other legislatures to corporations alone, are carefully fitted and made applicable to voluntary associations, unincorporated companies and partnerships.

But it may be suggested that in 1899 the Wisconsin legislature, seeing the fault in this previous legislation, by amendment remedied that fault. The statute of 1899, which was passed May 4th, and went into force on May 9th of that year (Chapter 351, Section 27 of Laws, Wis., 1899), amends Section 1770b by striking out the words "partnership" and "copartnerships" wherever they occur, by striking out the

provisions regarding subsequent violations after the first, and by adding a provision that any corporation which complied with Section 1750a of the annotated statute should not be required to make any further deposit under Section 1770b of the laws of 1898. This amendatory act is significant, as pointing out the fact that the Wisconsin legislature itself realized the unconstitutionality of its previous enactment and sought by this amendment to make it constitutional.

This amendment, made in 1899, was no evidence whatever of the legislative intent in 1897 or 1898. It only shows what the legislature intended in 1899. The legislature then was doubtless composed in part of different persons from the previous legislature, so that it cannot be known whether the previous legislature would have passed the act in the form that the amendment of 1899 left it. At all events, it did not pass any such act.

This amendment, it must be supposed, was not idly enacted, and the fact that it was passed may be taken to show that its passage was necessary in order to carry out the ideas of the legislature of 1899. Now, if so much of the act of 1897 as did not concern partnerships was valid, even though the inclusion of *partnerships* was unconstitutional, it was totally unnecessary for the legislature of 1899 to strike out the word partnerships. The fact, however, that the legislature did amend the previous act by striking out the word which left in would have no effect, does tend to show that the whole act was void on account of the inclusion of partnerships in its provisions.

But whatever effect this amendment might be contended to have in remedying the unconstitutionality of the law of 1898, it cannot benefit defendants in error for the following reasons:

1. It is not pleaded in the United States Glue Company's answer, but the original statute unamended is pleaded.

2. The contract on which suit is brought was not only made before this amendment *went into force,* but was made and in good part performed before this amendment was even *enacted.*

3. The amendment did not do away with the objections as to the unconstitutionality of the act. The amendment strikes out the words *partnership* and *copartnership* from the act, but it does not strike out or affect the provisions as to common law stock companies or other voluntary associations.

The act, as it stands when amended, would prevent the citizens of other states from organizing a land association for the purpose of investment in Wisconsin lands; it would prevent an ordinary unincorporated club formed, say in Chicago, from sending an agent into Wisconsin for the purpose of arranging for an excursion or a dinner in Milwaukee; it would prevent a trades union, organized in another state, from having a branch in Wisconsin, unless, in each case, compliance were had with the provisions of Section 1770b.

It is clear that the citizens of any state have a right to do any of the ordinary acts of life in Wisconsin, free from any restraints not common to the citizens of Wisconsin, no matter whether the citizens of other states are acting individually or as a partnership or any other form of unchartered association which may seem most advisable to them.

A citizen of Illinois may do any of the ordinary acts of business or pleasure in Wisconsin which are not denied to the citizens of Wisconsin. A partnership of Illinois citizens has the same privilege, and an association of Illinois citizens, whether it be a trades union, club, land association

or any other association, by virtue of the United States Constitution, cannot be met at the Wisconsin border with the demand that it file papers and pay $25 to the secretary of state before it can be allowed to do any of the ordinary affairs of life in Wisconsin. This statute, even as amended, in 1899, would deprive such associations of this right. The amendment by specifically striking out the words "partnership" and "copartnership" would as pointedly leave in the words "association," "company" and "joint stock company" and therefore reaffirm the purpose of the Wisconsin legislature not to make the question whether a concern should be excluded from Wisconsin under certain conditions depend on the question of its incorporation under foreign law or not, but upon the question whether or not it was originated in Wisconsin. That purpose, as we have pointed out, is illegal, therefore, the Wisconsin statute, even after the amendment of 1899, still remains unconstitutional and must be disregarded.

II.

If the Wisconsin statute—Section 1770b of the Laws of 1898—affords a defense to the suit on this contract, then the statute is in so far unconstitutional, because it impairs the obligations of a contract.

The 10th Section, Article 1, of the United States Constitution, provides that no State shall pass a law impairing the obligations of contracts. This provision amounts to this: That any law of a State which impairs the obligations of a contract, valid when made, is, in so far as applied to that contract, unconstitutional and void. So that, if we have a case of a contract, valid when made, containing no provisions contrary to the law of the State where made, any law which

would, if enforced, impair the obligations of this contract as between the parties thereto, just so far as it would tend to do so, comes in conflict with the United States Constitution and cannot be sustained. The law may be perfectly valid for all other purposes; it may be valid in other respects, even as applied to the parties to the contract, but it cannot be allowed so to act as to release either of the parties to such contract from his obligations to the other.

Walker v. *Whitehead*, 16 Wallace, 314, was a case of a suit on a note given in 1864. In October, 1870, the Georgia legislature passed an act providing that in all suits on contracts the plaintiff should not recover unless he should show that all legal taxes payable on the contract had been duly paid for each year. This court held this statute unconstitutional, as it impaired the obligations of the contract They said (p. 317):

"These propositions may be considered consequent axioms in our jurisprudence.

"The laws which exist at the *time* and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This applies alike to those which affect its validity, construction, discharge and enforcement."

And later (p. 318), the court says:

"The obligation of a contract is the law which binds the parties to perform their agreement.

"Any impairment of the obligations of the contract—the degree of the impairment is immaterial—is within the prohibition of the constitution. * * *

"Against all assaults * * * the contract is shielded by the constitution. It must be left with the same force and effect, including the substantial means of enforcement, *which existed when it was made*. The guarantee of the constitution gives it protection to that extent."

In *Peninsular L. & C. W.* v. *Union, etc., Co.*, 100 Wis., 488, 496, the court said:

"A contract includes by implication the law for its enforcement as the same existed at its inception, and any change materially impairing the right or interests of the parties so it may be said the contract obligation is impaired, is within the constitutional inhibition and void."

In determining whether the statute impairs the obligations of this contract, we must consider the effect intended to be given it by the legislature in two regards:

First. Was it to be regarded for any purpose as part of the law of Wisconsin, which necessarily entered into the contract between the parties before September 1st, 1898?

Secondly. If it were not before in force, did it so operate on September 1st, 1898, and thereafter, as to affect the obligations of the contract in question?

Taking the second question first, it is evident that if the statute was not for any purpose to be regarded as part of the laws of Wisconsin until September 1st, 1898, it was, as applied to the performance of the contract made before that date unconstitutional. For one provision of the statute required the foreign corporation to pay to the secretary of state a fee of $25.00. Now, such a fee was, of course, trifling in comparison with the interests involved in this contract, but if the legislature, after the contract was made, could impose as a condition upon one of the parties that it should pay $25.00 before being allowed to carry out the contract or to force the other party to carry it out, there would be nothing to prevent the legislature from compelling the payment of $250,000.00 instead of $25.00, and from thus as effectually doing away with the obligations of the contract as though it had passed a law annulling it.

The case of *Winter* v. *Jones*, 10 Ga., 190, 195, aptly states the correct rule as to when infringement of the constitution will avail to render a law void. Justice LUMPKIN, delivering the opinion of the court, says:

"All commentators, and all the adjudicated cases upon constitutional law, agree in these fundamental propositions: That the objection to a law, on the ground of its impairing the obligations of a contract, does not depend upon the *extent* of the change which the law may make in it. That any deviation from its terms, by *imposing conditions not expressed in the contract*, however minute and apparently immaterial in their effect, is within this constitutional prohibition."

So in *Robinson* v. *Magee*, 9 Cal., 81, 84, it was held that a statute in force after the purchase of certain county warrants requiring the holders to present the warrants for registry on or before a certain day, and making them void, if not so registered, is unconstitutional. The court says (p. 84):

"As the law enters into the contract, and is therefore a part of it, the obligations of such contract must depend upon the law *existing at the time the contract was made*. The contract being complete and operative, the legislature cannot, by a subsequent act, impair its obligations by requiring the performance of other conditions not required by the law of the contract itself."

Is not a requirement that a corporation should pay a fee of $25.00 and file its charter with the secretary of state before being able to carry out an otherwise valid contract made before the statute went into force, just as much an impairment of the obligations of the contract as a requirement that the contract itself should be registered?

And this court has said in *Green* v. *Biddle*, 8 Wheaton, at page 84:

"The objection to an act, on the ground of its impairing the obligations of the contract, can never depend upon the *extent* of the changes which the law effects in it. Any deviation from its terms, by postponing or accelerating the time of performance which it prescribes, *imposing conditions not expressed in the contract*, or dispensing with the performance of those which are, however minute and im-

material upon the contract or parties, impairs its obligations."

So in *Hope Mutual Insurance Company* v. *Flynn*, 38 Mo., 483; 90 Am. Dec., 438, it is said (p. 484):

"It is not within the constitutional competency of the legislature to annul by statute any legal ground on which a previous contract is founded, *or to create a new bar by which such action may be defeated.*"

The case in this view amounts simply to this: A corporation of Illinois comes into Wisconsin at a time when it has a perfect right to do so, makes a contract in no way involving the health or morals of the people of that State, perfectly valid when it was made—an ordinary business arrangement. Can subsequent legislation deprive it of the benefit of this contract? Supposing the law in question had simply provided that no contract made by a foreign corporation could be carried out in Wisconsin on any terms, and further provided that it was to go into force September 1st, 1898. Could it be contended that a contract made before September 1st, 1898, could not be carried out thereafter? And yet, such a law would embrace no more than the law in question as applied to the plaintiff's contract by the action of the trial court.

If, as seems to be well settled, a statute increasing a debtor's exemptions is void as to debts existing before it takes effect, how much more must a statute like this one be void if it would operate so as to abolish all remedy on a contract.

A contract executory as well as executed is protected by the prohibition against impairing contract obligations.

Fletcher v. *Peck*, 6 Cranch, 87, 137.

Taking up now the other question as to whether Section 1770b was part of the Laws of Wisconsin for any purpose before September 1st, 1898, this question has two bearings on the present case: First, the one above mentioned, that if the act was for no purpose in force before September 1st, 1898, its going into force at that date constituted an impairment of the obligations of the contract in this case and so was unconstitutional. Secondly, leaving out any constitutional question, the question still remains whether the act was intended in any way to affect the carrying out of a contract made before September 1st, 1898. These two questions—the constitutional one and the one simply of the construction of the statute, are so involved that to consider them entirely separately would waste the time of the court. We shall therefore treat the two questions in part together and cite some authorities bearing on the interpretation of the statute, both in regard to the application of the provisions of the constitution against impairing obligations of contracts, and in regard to the question of the application of the statute itself to acts done before it went into force, but after it was enacted.

The important question in both regards is as to what law entered into the contract as a part of it when it was made, that is, whether the statute was for any purpose in force before by its terms it went into effect. For if the law is regarded as speaking from September 1st, 1898, it cannot affect contracts made theretofore—whether executed or executory.

It would seem clear on principle that a statute can have no effect whatever before it is in force, that before that time no one need take notice of it, that it cannot become part of or affect contracts made theretofore. Were it otherwise there would be a time when no contract could be safely made con-

cerning the subject-matter of a statute, for the theory upon which a statute affects the performance of the contract is that the statues in force at the time the contract is made enter into and become a part of the contract itself. Now, a statute enacted but not yet in force can hardly so enter into a contract as a part of it, for such a statute may be repealed before the time arrives when it shall go into force and in consequence it may never be a part of the law of the state. Consequently, if such an enactment which never becomes a law, or which may never become a law, is allowed to be regarded as part of the contract between the parties, then the parties make a contract as to important terms of which they can have no knowledge for some time after their contract is made. That is, as they do not know whether the statute ever will be, in fact, a law, the contract between the parties may mean one thing, and may mean another, dependent upon the question whether or not the statute is allowed to go into effect.

We do not here contend that it is beyond the power of the State, by appropriate legislation, to enact that there shall be a time within which contracts can only be made subject to a contingency as to whether certain laws shall in future be in force or not in force, but it is evident that such was not the purpose of the Wisconsin legislature, nor is it conceivable that such should be the purpose of any legislature. It will be observed that in this case, the statute which the defendant is attempting so to apply as to annul the contract which it made with the plaintiff was enacted more than a year before it was to go into force, so that according to defendant's theory, during all this time the capacity of foreign corporations concerning business to be done in Wisconsin would remain in suspense. The corporations could not know whether

this Section 1770b would ever be a law or not—whether it would be read in as a part of their contracts or not.

Let us carry the argument a little farther, supposing the contention of the defendant to be correct. It is within the power of the State to enact, say in 1900, all sorts of laws which are not to go into effect by their terms until 1905, and then, when contracts are made, relying on these laws—as, to follow defendant's argument, contracts made in the interval would have to be made—the State may repeal the laws before they go into effect and thus effectually impair the obligations of these contracts. This is somewhat far-fetched perhaps, but it is a possibility, and the only way of meeting it is by the view that a law is no law until it is in force.

It is a general principle that all persons must take notice of the laws of the place where contracts are made, but the defendant, to make out its defense, has to extend that principle to include a rule that all persons must take notice not only of all laws at the time and place where the contract is made, but also of laws which the legislature has said, in a way that does not bind the legislature itself, shall be in force at some future time. As well might a party be held to be bound by a notice of every bill introduced by a member of the legislature and the contention raised that a party's rights are affected by an act subsequent because the bill was introduced before his contract was made.

Our argument is not affected in the least by the fact that the legislature may at any time repeal any law that it has enacted, for such a repeal does not operate to restrain the effect of the law so far as it entered into a contract made while it was in force. (*Fletcher* v. *Peck*, 6 Cranch, 87, 135.) Whereas, a repeal of an act which has never been in force must have precisely the same effect as though such an enact-

ment had never been made at all. It must wipe it out root and branch. It would indeed be peculiar to hear a litigant claim that a contract was void because a law had been enacted affecting it but had been repealed before it ever was in force. The argument on behalf of the defendant makes every law, against the will of the legislature, in force so far as it affects contracts from the moment of its enactment.

We, of course, are not now concerned with the effect of this statute upon the Diamond Glue Company as between it and the State of Wisconsin in case it attempted to do business in Wisconsin, even solely in carrying out this contract, without complying with the statute. This is not the question before the court. It might indeed be interesting to inquire whether a State, in direct proceedings against a foreign corporation could collect a penalty from a foreign corporation for carrying out a contract, valid when made but the performance of which was made a penal offense by a subsequent act of legislation. But this is not the question in this case. This court is not called upon to decide between the State of Wisconsin and the plaintiff. The question here is simply whether the defendant can escape the obligations of its contract as between itself and the plaintiff by claiming that these obligations are impaired, in fact, done away with, on account of legislation in force only after the making of the contract and after its partial performance.

There is another consideration which enters into the construction of this statute. It has been pointed out that the statute purports to invalidate contracts made against its provisions in so far only as it may be to the advantage of the foreign corporations to endeavor to enforce these contracts, while it expressly holds them valid in favor of those who may contract with the foreign corporation. But if the stat-

ute is to be allowed to have the effect contended for by the defendant, a curious state of things will result—the contract, if made after September 1, 1898, when the statute was in full force, would be enforceable against the plaintiff but not against the defendant, whereas, when made before September 1, 1898, its performance after that date became illegal and the contract was invalidated on behalf of both plaintiff and defendant; for the theory of Judge Seaman's opinion is that the defendant was justified in breaking the contract in December, 1900, because it was justified in refusing to *assist in the breach of the statute*. For certainly, on that reasoning, if the defendant was justified in refusing further to carry on the contract on the ground that it would be assisting in a breach of the law, it could not be held to demand that the plaintiff should go on breaking the law if the plaintiff should have chosen to declare the contract at an end. So that we would have this result: contracts made after the enactment of the statute but before it went into effect might be wholly avoided by the action of the statute, whereas contracts made after the statute went into effect would be only avoided as regarded one of the parties thereto. Thus the statute would operate with greater deterrent effect when it was not in force than after it went into force.

And it is no answer to this contention to say that it was an implied term of the contract that the Diamond Glue Company should, on September 1, 1898, comply with the statute. Such a term could be implied only on the theory that the statute was part of the law in force when the contract was made, while the legislature expressly provided that it was not.

Sedgwick, in his work on Statute Law, page 83, says in regard to the time when a statute is in force:

"This subject is of no small consequence as the law is assumed to be known by every citizen *from the time fixed for it to go into operation.*"

And in the Encyclopedia of Law, 1st Edition, Vol. 23, page 218, we find:

"Before that time no rights may be acquired under it, *and no one is bound to regulate his conduct according to its terms.* It is equivalent to a legislative declaration that the statute shall have no effect until the designated date."

Other text writers lay down the same rule:

"Until the day when an act is to take effect arrives, the law has no force, even as notice to the persons to be affected by it." Endlich, Interpretation of Statutes, Section 499.

"A statute which is to become a law at a future day is a nullity in the meantime. It does not even operate as notice to persons to be affected by it, nor does a repealing clause in it put an end to the law to be repealed. One cannot be punished under it for what he does before the day of its taking effect." Bishop on Written Laws, Section 31.

"Statutes do not always go into effect from the time of their enactment. When they are, by the constitution or their own provisions, made to take effect at a future date, they will be regarded as retrospective, in so far as they undertake to regulate duties or obligations which may arise prior to that date, though subsequent to the enactment of the law. The mere fact that parties contract, with actual or constructive notice of an impending change in the law, raises no presumption that the contract was made with reference to such change. *The law by which men are supposed to be governed in all their transactions is that in force at the time, and not that which they have reason to believe will go into operation at a future day;* until then it does not become a law in the fullest sense of the term, nor can they know that it will ever become binding. *The law-making power may repeal it before the time of its going into effect arrives,* with the repeal to take effect at once. *The very object of fixing a future date would be utterly defeated by a construction which gave effect to the statute prior to the time fixed.* So, where a statute decreed that after a designated future date no arrearages of rent should be *recovered* by action,

within six years after the same should have become due, it was held that it could not take effect by being pleaded to an action *commenced* before that date." Wade on Retroactive Laws, Section 33.

In *Dewart* v. *Purdy*, 29 Pa. St., 113, 117, the court said:

"Retro-active legislature is not necessarily unconstitutional, but unless it be remedial it is uncongenial to our institutions and hazardous to private rights. Nothing short of the most indubitable phraseology is to convince us of the fact that the enactment is to have any other than a prospective operation; and when they fix a future day for it to take effect, they stamp its prospective character on its face."

"Had it been repealed before that date, it would have had no future existence and no operation whatever. Though not repealed, it must not have a construction that would give it effect during the period of its suspended animation, for this were to violate the will of its creator."

So in the case of *Commonwealth* v. *Fowler*, 10 Mass., 290, an act creating a new county and providing for the appointment of officers therein by the governor was not to take effect until a future day there mentioned. The governor, before that day came, attempted to appoint an officer in the county, and it was held that such appointment was void. The court says (page 300):

"The act for erecting a number of towns in the south part of the County of Hampshire into a separate county by the name of Hampden passed the legislature on the 25th day of February, 1812. But, by the last section of the act, its operation was suspended until the 1st day of August then next; no provisions being made for the appointment of officers in the interim. We are all of the opinion that the proceeding of the executive in this case was irregular and that the appointment of the respondent to the office of judge of probate for the County of Hampden, at the time when it was made, was void."

The case of *Jackman* v. *Garland*, 64 Maine, 133, is also in point. There an act was passed and approved March 3rd, 1874, requiring a certain notice to the selectmen of a town

of any injury caused by a defective way within sixty days of the accident, except in the case of injuries "already sustained." This act, by a provision of the general law, did not go into effect until thirty days after the adjournment of the legislature. It was held that the act did not apply to the case of an injury received March 7th, 1874, between the enactment and the going into force of the statute. The court says (page 136):

"An act is of no force until it becomes a law. The words must be construed *as if spoken when the act takes effect.* In legal contemplation that is the time when they were spoken."

To the same effect is the case of *Sammis* v. *Bennett,* 32 Fla., 458. In 1893 the Florida legislature passed an act providing that appeals in chancery might be taken within six months after the entry of the order from which the appeal was taken. This act was approved May 11th, 1893, and went into force by provision of the Constitution August 1st, 1893. It was held that it had no force until August 1st and applied only to decrees and orders entered after that date. The court said (p. 460):

"The purpose of Section 18 of Article 3 of the Constitution, that a statute shall not take effect until sixty days from the final adjournment of legislature at which it may have been enacted, unless it is otherwise specially provided in the act, is, according to what we hold the better view, to enable the people to become acquainted with its provisions, but not to require them to govern their acts by the law before it becomes operative. It was contemplated that by the lapse of the sixty days the status of the session of the legislature would be published and would be accessible to the public, but they are not operative laws until the stated period has expired, and no one can be charged with notice of them reasonably until it does expire, or, what is the same, until they go into effect."

The purpose of the legislature in postponing the opera-

tion of Section 1770b until September 1st, 1898, was to allow the people to become acquainted with the law at that date and was not in order to compel them to govern themselves by it in the meantime. Following the decision of the Florida court, this section in so far as it affects the performance of a contract, would only affect those made on or after September 1st, 1898.

So in *Larrabee* v. *Talbott,* 5 Gill. (Md.), 426, the court said (p. 441):

"The said bankruptcy law of the United States was passed on the 19th day of August, 1841; but it was expressly provided by the 17th section of the statute that it should take effect only from and after the 1st day of February, 1842. This was equivalent to declaring that the act should have no effect until that day; and therefore there is no foundation for the point made by the counsel for appellant that the insolvent laws of Maryland were suspended during the period between the enactment and the going into force of the United States law."

This last case cites *Ex parte Eames,* 2 Story, 322, 325, where Justice Story says of this same bankrupt act:

"It *ipso facto* suspended all action on future cases arising under the State insolvent laws where the insolvent persons were within the purview of the bankrupt act. I say future cases, because very different considerations would or might apply, where proceedings under any State insolvent laws *were commenced and were in progress before the bankrupt act went into operation.*"

The case of *Charless* v. *Lamberson,* 1 Iowa, 435, is a good illustration of the principle that until a law is in force it is as though never enacted. This case was an action by an execution purchaser to recover a lot. The defendant bought the lot in 1848, and on July 7th, 1851, moved on it. By the statute of 1849 the defendant could have had a homestead from combined ownership and occupancy. A new code approved February 11th, 1851, to go into effect July

1st, 1851, repealed the act of 1849 and substituted other provisions. The execution purchaser recovered his judgment in May, 1851, but did not levy his execution until after July 6th of that year. It was held that his judgment, having been recovered when the act of 1849 was in force, even though the act of 1851 was already enacted which repealed the act of 1849, was governed solely by the act of 1849 as to the remedy by which it was to be enforced, even though this remedy was not enforced until after the act of 1851 went into effect. That, however, the defendant could only claim his exemption under the act of 1849, and not having perfected it while that act was in force the plaintiff must recover. The decision is all the more pointed from the fact that the act of 1851 excepted debts contracted "prior to the passage of this law," and it was held that even this expression must be read as speaking from the time the law went into effect and as meaning debts contracted prior to July 1st, 1851, and that, therefore, there was no attempt by the legislature to control judgments obtained between February 5th and July 1st, 1851.

The Iowa constitution provided that "no law of a public nature should *take effect* until same shall be published and circulated in the several counties of this State by authority," and the court regarded the postponement of the taking effect of the act until July 1st, 1851, as intended to give time for such publication, etc. (p. 443):

"Had it never been published and circulated it would have been no more the law of the land than if it had never been passed. Neither was it the law, so as to affect the rights and property of parties, until it was so published. The words 'prior to the passage,' I think amount to the same thing as if the legislature had used the word 'heretofore,' and either must relate to the time of taking effect and not to the time of passage."

So we may say that the arrival of September 1st, 1898, was just as essential to the existence of Section 1770b as a law, as was its passage by the legislature. Before September 1st, 1898, it had no more the force of law than if it had never been enacted. Until September 1st, 1898, it could not affect the property, rights or contracts of the Diamond Glue Company. It is admitted it did not absolutely invalidate the contract. How can it be in force so as to become part of a contract and yet not be in force sufficiently to invalidate one? Following the decision in the *Charless* case, the rights of the Diamond Glue Company acquired in between the enactment and the going into force of Section 1770b could be enforced, even after the law went into force, without reference to it.

In *Rice* v. *Ruddiman*, 19 Mich., 125, 135, it appeared that an act had been passed by the Michigan legislature, organizing the County of Muskegon; it was approved February 4th, 1859, and, not being ordered to take immediate effect, under the Michigan constitution went into effect May 16th, 1859. The act provided for the election of county officers "at the annual township meeting to be held in April next." The County of Muskegon was attempted to be organized under this act, and the contention was made that the act was void, inasmuch as it provided for an election to be held before the act itself could take effect. In regard to this point the opinion delivered by Judge CHRISTIANCY said:

"It took effect in May, 1859, and must be understood as beginning to speak at the moment when it became a law and not before. *It must have the same construction as if passed on the day when it took effect.*"

So with Section 1770b, it should be regarded as speaking only from the moment that it took effect and as if enacted

on September 1st, 1898. Contract rights acquired before that date cannot be affected by it. Up to that time no one was required to take notice of its provisions or pay any attention to it.

The Supreme Court of Wisconsin has had occasion to pass upon this very question in the case of *State* v. *Messmore,* 14 Wis., 163. At that time the Wisconsin constitution required that each of the circuit judges should be a resident of the circuit for which he was elected, and that such residence must continue as long as he continued to be judge. The legislature passed an act creating a new circuit and thereby restricting the boundaries of one of the old circuits so as to leave the residence of the judge of that circuit outside of the new boundaries. It appears that the act was approved March 30th, 1861; was published April 4th, and by its terms went into effect April 10th. The material question in the case was as to when the judge was obliged to move to the new circuit. The court held that he had a reasonable time *after April 10th,* the date when the act went into effect, and that he was not obliged to take notice of the act from the time of its passage, or even of its publication. They say (page 175):

"We do not, however, hold that the judge was bound to take notice of the change or prepare to remove until the act was to go into actual operation. In these times of fluctuating and uncertain legislation, it would be enough that he prepared for the contingency when it actually happened, and then he must have a suitable and convenient length of time for that purpose. *For aught that he knew or might suppose, the law might have been repealed, or further suspended, before the day fixed for its taking effect.*"

This quotation must be taken as expressing the law of Wisconsin, and the court has only to apply it to the statute in question in order correctly to construe that statute. For it will not be disputed that the rules laid down by the Su-

preme Court of a State in construing the legislation of that State are binding on all other courts. Here, then, we have the Supreme Court of Wisconsin saying that it is not necessary for persons to take notice of the terms of a Wisconsin law or to prepare for compliance therewith until that law goes into operation, using the very reasoning which we have pressed in our argument: that it could not be known before the act actually went into effect whether it would ever become a law, inasmuch as it might be repealed before that time. Now, if we follow the Supreme Court of Wisconsin in construing this statute, this contract must certainly be free from its operation. At the time of making the contract the parties were not bound to pay any attention or in any way to prepare for the operation of any law which was not then in effect—and which might never be. The law did not become part of the contract, nor was an agreement to comply with the law to be implied as among its terms, and when the law finally did go into effect on September 1st, 1898, it was as though it had not been enacted before that date. That was the first day in which any one was obliged to take notice of the provisions of the law. Therefore, if the law on that date affected the obligations, no matter how slightly, of the contract made before that time, it is so far unconstitutional. In other words, the obligations of the contract theretofore made were free from the restraints or the conditions of that law. The parties to this contract were just as much obliged to carry it out as though that law had never been enacted—as though it never had gone into force. The United States Glue Company was as absolutely bound to carry out the provisions of the contract and bound to give the Diamond Glue Company the benefit of it.

In the face of all these authorities, counsel for the defendant in error contended, and the court held, that the Dia-

mond Glue Company, in making the contract of June 25th, 1898, was obliged to take notice of the terms of the statute which did not become a law until September 1st, 1892. We quote from a written argument made by counsel for the defendant in the Circuit Court:

"Counsel seems to consider that we have contended that it was illegal for the parties to make the contract in June, 1898.

"We have merely contended that the contract was entered into with full notice that it would be illegal for the plaintiff to perform it, unless it complied with the Wisconsin statute,"—in other words, that the Wisconsin statute, which, by its own terms, was not to "go into operation" until September 1st, nevertheless operated to the extent of entering into, affecting and becoming part of a contract made June 25th. Contrast this with the statements made by the text writers, and the decisions above cited, and especially with the language of the Wisconsin Supreme Court, in *State* v. *Messmore*, *supra:*

"We do not, however, hold that the judge was bound to take notice of the change of the power to remove until the act was to go into operation * * * for all that he knew, or might suppose, the law might be repealed or further suspended, before the day fixed for its taking effect."

State v. *Bond*, 49 N. Car., 9, was a criminal case where the defendant had been accused of selling liquor to slaves. The offense was charged to have been committed October 10, 1855. In 1854 the legislature had enacted a revised code to go into effect January 1, 1856. This code enacted new rules as to the quality of proof necessary in convictions of this sort. It was held that, although the trial was had after January 1, 1856, still, this provision of the revised code would make the law an *ex post facto* one, contrary to the United States Constitution, and the judgment of conviction was therefore reversed.

Inasmuch as the same section of the constitution (Art. 1, Sec. 10) forbids states to pass *ex post facto* laws and laws impairing the obligations of contracts, it would see that similar reasoning to that in the case of *State* v. *Bond* would lead directly to the result that no law should be allowed to release any party to a contract from its obligations, if the law went into effect after the execution and part performance of the contract, even though enacted before such execution.

But we are not left alone to argument by analogy and on principle as to the effect of a statute upon a contract made after the statute was enacted, but before it was to go into force. The case of *Mix* v. *Vail*, 86 Ill., 40, was a suit on an injunction bond. It appears that by virtue of a statute of 1861 no suit could be maintained for damages upon an injunction bond unless the damages were assessed in the suit in which the bond was given. A statute was passed by the Illinois legislature and approved March 25, 1874, which provided that the failure to assess damages in a suit should not operate as a bar to an action upon the injunction bond. This act went into effect July 1, 1874. On June 26, 1874, the injunction bond on which action was brought was given, and the injunction was dissolved July 16, 1874, fifteen days after the act changing the effect of the bond went into force. In other words, the relation of the statute and the contract were precisely what they are in this case. The statute was first enacted, to go into force at a future day, then the contract made, operating a short time before the statute went into effect and a longer time after the statute went into effect, suit was brought on the contract and an attempt made to apply the statute to it. The court says (p. 44):

"As the act had been passed when the bond was executed, although it was not to go into effect until afterward, July 1, 1874, it is said that, as the obligors knew that a change in

the remedy on injunction bonds would go into effect July 1st, after, the law became part of the contract. *But although passed before, as the statute was not to go into effect until July 1, 1874, it was, until that time, as no statute,* and cannot be admitted to have any effect on the bond in question."

* * * "By the bond itself, then, there is no liability here, because there was no award of damages previous to the institution of the suit, and to admit a liability by force of the statute of 1874 would be to give that statute a retrospective operation, and impose a liability, under a previous contract, where without the statute no liability existed. This cannot be done; it would do more than affect the remedy—*it would affect the obligation of the contract* by creating a liability where none at the time existed."

Justice DICKEY dissents, saying:

"At the time of the execution of the bond, the statute of 1874 had been enacted, though no operation could be had until July 1, 1874. The contract was made in view of that act thus enacted, and was to be performed after July 1st, and the breach occurring after that act was in force, I think the case comes within the provision of that statute."

Judge SEAMAN held the same views as to the effect of the statute in the present case upon the contract between the Diamond Glue Company and the United States Glue Company as appears from these words of Justice DICKEY. It is, therefore, evident that the same arguments were used in *Mix* v. *Vail,* as prevailed in the Circuit Court in the case at bar, but the Supreme Court of Illinois, by a majority of six to one, and in very decided opinion, held this argument unsound.

The opinion of the court in *Mix* v. *Vail* makes it clear that the statute cannot be applied to a contract made after the enactment of the statute but before it becomes a law, except by giving the statute some operation during that time. The Circuit Court did this, yet the statute itself provided

that it should not "go into operation" until September 1, 1898, after the contract was made.

But *Mix* v. *Vail*, although directly in point, was not as near in its facts to the case at bar as was some litigation concerning a statute of Indiana regulating the conditions on which foreign building and loan associations might be allowed to do business in Indiana. This statute was approved March 3, 1893, and was in force by its terms April 1, 1893. (Although there seems to be some doubt as to whether, on account of constitutional provisions, it was in force before May 18, 1893.) See Laws of Indiana, 1893, p. 274.

This statute came before the Indiana Supreme Court in the case of *Security Savings Association* v. *Elbert*, 153 Ind., 198, a suit to foreclose a mortgage given to a Minnesota building and loan association in Indiana, on Indiana property, by a resident and citizen of Indiana, who, as a part of the contract, became a stockholder in the Minnesota association, the plaintiff, on the usual terms, that is, on making payments from time to time on his stock, and paying interest on his loan, etc. The business of taking defendant's subscription and making the loan to him was done through a resident agent. The association did not comply with the said act of 1893 and this fact was set up in defense. In regard thereto the opinion of the court (p. 203) was as follows:

"The act of 1893 decreeing that it should be unlawful for a foreign corporation to do a building and loan business in this State until it should have deposited bonds, etc., must be read prospectively, if possible: *must be read as not impairing the obligations of existing contracts, to be constitutional.* To meet these requirements the act must be construed to mean that the business which may not be lawfully done, until the terms are complied with, is the making of new contracts, the issuance of new shares, and the execution

of new loans. *If a contract is valid when executed which contemplates the lapse of several years before all its terms are carried out, it must be held to remain valid and enforceable to the end under the laws* IN FORCE *at the time of its execution, no matter what changes the law has undergone in the lifetime of the contract.*"

This case, of course, did not involve a contract made during the period between the enactment and going into force of the statute, but in the same volume is found the case of *National Home Building & Loan Association* v. *Black*, 153 Ind., 701, which case is precisely similar to the Elbert case except that Black became a stockholder and obtained his loan March 25, 1893, *three weeks after the statute had been enacted, but before it went into effect.* The court held, nevertheless, that the act, although enacted before the contract was made, had no effect upon the contract because it did not go into force until after the execution of the contract, saying:

"It will be observed that the note and mortgage sued upon were executed after said act of 1893 took effect. It follows that this case is ruled by *Security, etc., Association* v. *Elbert, Ante*, 198."

We have not been able to find any other cases involving this precise point—the applicability of a statute to a contract made before the statute goes into force, but after its enactment,—but these cases both decide squarely that such a statute cannot affect the obligations of such a contract, and this on two grounds: that so to apply the statute would (1) make it retroactive, since it can only speak from the time it goes into force, and would (2) impair the obligations of a contract.

It must be borne in mind that the Wisconsin statute pleaded in this case was not designed to change the substantive law as to contracts of this nature, nor to forbid for-

eign corporations to make this sort, or any sort, of contracts in Wisconsin; so that any suggestion, absolutely baseless in fact, that the Diamond Glue Company made this contract to evade the statute, is absurd.

Had the law in force in Wisconsin on June 25th, 1898, made such a contract absolutely void, it would hardly be contended that compliance by the Diamond Glue Company with Section 1770b on or after September 1st would of itself validate the contract. How, then, can the lack of such compliance invalidate a contract valid when made?

If the Wisconsin legislature had intended to enact that this statute should be read into all contracts made after its enactment, but should not otherwise be in force until September 1st, 1898, it would have been easy so to provide. But no such provision was made. Reason and authority, therefore, unite in treating the statute as if enacted September 1st, 1898.

The reason for providing that a statute shall not be in force until some future time is to give all persons a chance to become acquainted with its provisions by that time. But this precaution is entirely nullified if a statute is to be held to affect the performance of contracts entered into at any time after the enactment, for persons then are in effect obliged to know the provisions of a statute the instant it is approved, or they may find an advantageous contract turned into a ruinous one because of conditions annexed to its performance by laws not in force at its execution. It may be said that in the case of this contract there was ample time to learn the provisions of the statute, but surely the case would not be different had the contract been concluded the instant after the statute was approved. The courts are not at liberty to pick out some time between the enactment and

the going into effect of a law, when parties are bound to take notice of it.

There is another consideration which will show the fallacy of defendant's argument that a lack of compliance with the statute by the Diamond Glue Company released the defendant from the contract.

It must be admitted, as it was admitted by the learned judge of the Circuit Court, that the contract was valid when made and that the only duty of the plaintiff was to file its articles with the secretary of state as soon as the law went into effect. It will not, we think, be denied that the filing of these articles and paying the fee before the statute went into effect would have been nugatory; because before the time the contract went into force the secretary of state had no authority to accept the fees or the articles of incorporation. (*Commonwealth* v. *Fowler*, 10 Mass., 290.) Now, therefore, in order to comply with the statute the Diamond Glue Company must have acted after the statute went into effect; that is, some time after midnight, August 31st, 1898. Then between the hour of midnight of August 31st, 1898, and the time in September 1st, 1898, when the secretary of state might have his office open for business, the Diamond Glue Company would necessarily be breaking the statute and just as necessarily the United States Glue Company would be relieved from its contract. In other words, following the defendant's argument to its logical conclusion, the effect of the statute was necessarily to release the United States Glue Company from its contract with the Diamond Glue Company, and to make it impossible that any foreign corporation could make any binding contract after the passage of Section 1770b and before September 1st, 1898, to be performed thereafter.

It may be answered that this is an absurd construction of

the statute; that it must be construed reasonably, and the Diamond Glue Company must have been given a chance to comply with the statute. But there must have been some instant when, if this statute were to affect the operation of the contract, it would do so. That instant can be no other than the instant the statute goes into effect. If the question of the plaintiff's intention is to enter into the case, then it must be shown that the plaintiff willfully refused to comply with the statute, and the defendant must fail in its case, for there is not a scintilla of evidence to show that any of the officers of the plaintiff were aware, or, for that matter, had any cause to believe that the plaintiff was doing business in Wisconsin; nor, indeed, is there anything to show that they were aware of the existence of the statute. Certainly the defendant did nothing to inform them of the statute; its complaints being entirely directed to the alleged failure of the Diamond Glue Company to carry out the contract, thus impliedly asserting all the time that the contract was valid; demanding performance of the very acts which it now claims could not be lawfully performed by the plaintiff or accepted by it.

III.

The interstate commerce clause of the Federal Constitution forbids the application of the Wisconsin Statute to the performance of the contract in question, and if the Wisconsin Statute properly interpreted embraces the performance of this contract, then it is so far void.

The contract as interpreted by the parties, and its performance as shown by the evidence, were wholly concerned with interstate commerce. At the time of the breach by the defendant, all that the contract required on the part of the Diamond Glue Company was, that it, an Illinois concern,

should, from its Chicago and other offices (all outside of Wisconsin) (Rec., pp. 11, 42) sell the product of this Wisconsin factory, to be shipped to various parts of the country. The only unexecuted part of the contract, as the parties interpreted it, on the part of the plaintiff was the selling by it of the product of the factory for commissions to be paid by defendant. The market for this product was looked for outside of Wisconsin. The contract did not require the Diamond Glue Company to maintain sales agents or an office in Wisconsin, and, in fact, all the actual sales were made at the main office of the Diamond Glue Company, or at its branch offices outside of Wisconsin. (Rec., pp. 42, 44.) It is well settled that transactions of this character are interstate commerce, and their control is beyond the province of state legislatures, whether they are carried on by corporations or by individuals.

In the concurring opinion of Justices MATTHEWS and BLATCHFORD in *Cooper Manufacturing Co.* v. *Ferguson*, 113 U. S., 727, 736, occur these words:

"In the present case, the construction claimed for the constitution of Colorado, and the statute of that state passed in execution of it, cannot be extended to prevent the plaintiff in error, a corporation of another state, from transacting any business in Colorado, which, of itself, is commerce. The transaction in question was clearly of that character. It was the making of a contract in Colorado, to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchaser in Colorado. That was commerce; and to prohibit it, except upon certain conditions, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress. It is quite competent, no doubt, for Colorado to prohibit foreign corporations from acquiring a domicil in that state, and to prohibit it from carrying on within that state its business of manufacturing, but it cannot prohibit it from selling in Colorado, by contracts made there, its machinery manufacturede elsewhere, for that would be to regulate commerce among the States."

It was there held that a contract, made in Colorado, for the manufacture of machinery in Ohio to be delivered in Ohio for transportation to Colorado was interstate commerce. *A fortiori*, the making of a contract in Chicago for the shipment of glue from Wisconsin to various outside points, is interstate commerce. All the other provisions of the contract between plaintiff and defendant were simply preparatory to, and designed to facilitate this commerce, and were dependent upon it, and as interpreted by the parties to the contract did not contemplate the maintenance of any agents in Wisconsin by the Diamond Glue Company. The whole object was to sell the glue and grease from Chicago, and the provisions concerning the furnishing a superintendent, giving the United State Glue Company the benefit of advice, etc., in making plans, the greater part of which were carried out outside of Wisconsin at any rate, were merely incidents to this commerce. For that matter, contracting to furnish the superintendent was in itself a matter of interstate commerce. Contracts concerning the sending of persons across state lines are considered interstate commerce as much as the sending of goods. *McCall* v. *California*, 136 U. S., 104, 108.

In *Robbins* v. *Shelby Tax District*, 120 U. S., 489, 494, it was held that the statute of Tennessee enacting that all drummers should be required to pay a license fee was unconstitutional so far as applied to persons doing business on behalf of concerns located in other states, inasmuch as such business was interstate commerce. If it is a regulation of interstate commerce and therefore unconstitutional to tax drummers from outside of the state, traveling in the state where the tax is laid, an act which interferes with the selling of produce inside of a state by a house situated outside of the state is certainly as invalid. See, also, to the same effect, *Corson* v. *Maryland*, 120 U. S., 502.

Certainly if the representatives of a corporation of one state may travel in another for the purpose of there selling goods of the corporation, and may do this without leave or license and contrary to the will of the legislature of the second state, it is not merely interstate commerce itself that is legalized by the United States Constitution, but all things incidental to it. For instance, it will hardly be denied that such traveling salesmen, even when acting for corporations, have the right to purchase meals, arrange for lines of travel from point to point within the state, and do all necessary things, or things which to them might reasonably appear to be necessary in the prosecution of the purposes of interstate commerce. And as long as their principal purpose is the furtherance of interstate commerce it makes no difference whether the means chosen by them are absolutely necessary to that end or not. Likewise, as the chief end and aim of the contract in question was the doing of interstate commerce and as the compensation expected by the Diamond Glue Company was to come out of such commerce, it was certainly proper for the Diamond Glue Company, without any regard to any state legislation, to agree to give, and to give, the United States Glue Company such advice and information in regard to the manufacture of glue as were likely to enable the Diamond Glue Company to make larger and better sales of that glue. In *Milan Milling and Manufacturing Co.* v. *Gorten,* 93 Tenn., 590, it was held that it was an act of interstate commerce for a foreign corporation to sell and *set up* machinery in a state where it had no agents or office. Of course it might not have been considered interstate commerce for a foreign corporation to send agents into the state for the purpose of setting up machinery already there, but when the setting up of the machinery was merely incidental to the conduct of

interstate commerce the whole matter is held to be protected. So here, while it would not be considered interstate commerce for the employes of the Diamond Glue Company to give advice in Wisconsin as to the running of the glue factory there if that was the only connection that the Diamond Glue Company had with such factory, yet when such advice is given in performance of a contract concerning interstate commerce and such acts are fairly interpreted as in furtherance of such commerce, they certainly are protected along with the commerce, which is the object of the contract.

IV.

The Wisconsin Statute, even if constitutional and applicable to the contract between these parties, was misapplied by the Circuit Court.

The Circuit Court and the United States Glue Company both relied for their construction of the act upon *Aetna Insurance Co.* v. *Harvey,* 11 Wis., 394. This case is authority for the rule that if a Wisconsin statute affixed a penalty to the doing of an act, the act itself is thereby proclaimed illegal and no civil rights can grow out of it. The legislature is presumed to have intended that affixing a penalty to the doing of an act should have this effect. Such a presumption will of course not be indulged where it is inconsistent with the apparent purpose of the statute securing the penalty, when that statute was regarded as a whole. Especially is that true where, as in the statute in question, the legislature has carefully defined the precise extent to which it designed the statute to affect contracts and contract rights.

The legislature clearly expressed its meaning in regard to the bearing of this statute on contract rights as follows:

"Every contract made by or on behalf of any such association, company, corporation or copartnership affecting the personal liability of or relating to property within this state before it shall have complied with the provisions of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforcible against it or them."

This must be read in connection with the provision that the statute should go into force September 1, 1898. Until September 1, 1898, there could be no chance of complying with the statute and therefore the contract in suit, which was made June 25, 1898, cannot be of itself a violation of this statute. So much was admitted in the Circuit Court, both by the learned judge and by counsel for the United States Glue Company.

But the legislature in providing that contracts made by a corporation before its compliance with the statute and (necessarily) on or after September 1, 1898, should be void, has by clear implication allowed all other contracts to be valid and enforcible.

The contract was fairly made between business men on either side; its provisions were fully carried out by the Diamond Glue Company until the United States Glue Company declared itself no longer bound, having then obtained the greater part of the benefit of the contract. Under such circumstances the court should not be swift to allow a defendant to escape its obligations by setting up a statute, which, if it was broken, the defendant assisted in breaking and which it never called to the attention of the plaintiff.

The leading case of *Harris* v. *Runnels*, 12 Howard, 79, is instructive in this connection. That was a suit upon a note given as part of the purchase price of certain slaves. The defense was that the plaintiff brought the slaves into the State of Mississippi as merchandise in contravention of

the statute which regulated their importation, and it was contended that the plaintiff could not recover because he failed to comply with the statute before selling the negroes. The sixth section of the statute imposed a fine of one hundred dollars on both the seller and the buyer of such slaves.

The court considered the question with great care as to whether the imposition of the fine for the transaction avoided any contract growing out of it, and after reviewing the English authorities they say (page 84):

"Before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so." * * * "That legislators do not think the rule (that the contract is void) one of universal obligation, or that, upon grounds of public policy, it should always be applied, is very certain. For, in some statutes, it is said in terms that such contracts are void; in others, that they are not so. In one statute, there is no prohibition expressed, and only a penalty; in another, there is prohibition and penalty, in some of which, contracts in violation of them are void or not, according to the subject-matter and object of the statute; and there are other statutes in which there are penalties and prohibitions, in which contracts made in contravention of them will not be void, unless one of the parties to them practices a fraud upon the ignorance of the other. It must be obvious, from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined, before courts should refuse to give aid to enforce contracts which are said to be in contravention of them."

In accordance with this line of reasoning the court examined the Mississippi statute carefully and came to the conclusion that the proper interpretation of the statute did not render the contract growing out of the prohibited transactions void.

Similar careful examination of this statute and its possible effect will show, not only a case for the application of the rule of *expressio unius exclusio alterius*—that inasmuch as the statute expressly avoids contracts made after September 1, 1898, in so far as they benefit foreign corporations, provided the law was not complied with, such an express avoidance is equivalent to implied authorization of all other contracts—but also that the construction contended for by the defendant would give the curious result that the continuance of the obligations of the contract after September 1, 1898, would depend entirely upon the voluntary act of the plaintiff. So that, if the defendant's contention is right and the contract happened to appear on September 1, 1898, against the plaintiff's interests, plaintiff would only have had to fail to comply with the law and throw up the contract, excusing itself for its inability to perform the contract on account of the statute.

A statute should not receive a construction leading to an absurd result. Nor will courts forfeit contract rights of parties on any doubtful construction of a statute. We submit, therefore, that the Circuit Court erred in holding that the Wisconsin legislature intended to avoid contracts made before the statute—section 1770b—was in force, in addition to inflicting the penalty there provided.

Other language in the opinion in *Harris* v. *Runnels* is interesting as pointing out an additional reason why courts in this class of cases should be loth to interpret a statute in such a way as to release parties from their obligations. We quote from page 85 of the opinion:

"For aught that appears in the pleading, the defendant bargained for the negroes, knowing that they were brought into the state as he says they were. If, then, there was a violation of the law by his purchase, he stands *in pari de-*

licto with the seller, with this difference between them, that he is now seeking to add to his breach of the law the injustice of retaining the negroes without paying for them."

So in this case, the defendant, according to its own contention, not only assisted and urged the plaintiff to violate the law from the first of September, 1898, until the first of December, 1899, but having obtained the benefit of the knowledge and experience of the plaintiff in the erection of the glue factory, having had plans drawn for that factory in the plaintiff's office, now seeks to escape from payment, in the way specified by the contract, for this knowledge and experience and trouble, and adds to this supposed breach of positive law the undoubted and unblushing moral delinquency of seeking to hold the benefits of the contract without carrying out its part, even pushing this defense to protect it from the payment of over $1,600 in commissions admittedly earned by the Diamond Glue Company in selling its product.

V.

Where parties to an agreement have by their acts put a practical working construction on it, such a construction controls, unless directly opposed to the plain meaning of the agreement.

The whole strength of the defense in this case rests upon the contention that the contract between the parties gave the Diamond Glue Company real control of the United States Glue Company's factory. We think this question immaterial, for the reason that, supposing the Wisconsin statute valid, and controlling this contract, its applicability to the case at bar would depend upon what the parties actually did and not the things they had agreed to do before the statute went into effect.

But, supposing the mere provisions of the contract to be of importance, they did not, as interpreted by the parties, give to the Diamond Glue Company such powers over the United States Glue Company's factory as was taken for granted by the learned judge of the Circuit Court. The only parts of the contract bearing on this question are the following:

"It is further agreed that the party of the second part (Diamond Glue Company) shall have the management of the manufacturing in said factory and shall operate same for the party of the first part and furnish a superintendent, whose salary shall not exceed $150.00 per month, to the party of the first part, and that party of the second part, by its officers, shall give said factory such personal supervision as may be necessary from time to time in the operation of the same, and said officers will give party of the first part in the management and operation of the said factory the benefit, at all times during the life of this contract, of the experience and knowledge of said officers and their company.

"Party of the second part agrees to keep said factory supplied with a capable superintendent at all times during the life of this contract, whose salary shall not exceed the amount hereinbefore stated.

"It is further agreed that party of the second part shall control, handle and sell the entire output, including glue and by-products of said factory, and all such products shall be billed and sold as the product of the United States Glue Company, but it is agreed that all invoices shall be stamped 'Diamond Glue Company, exclusive sale agents.'" (Rec., 76.)

Of course the first four lines of this part of the agreement standing by themselves would seem to contemplate that the Diamond Glue Company should have the actual control of the factory and should be in possession of it by its officers or agents; but the next clause provides that the Diamond Glue Company shall furnish the United States Glue Company a superintendent, who is to be paid $150 per

month by that company, which is inconsistent with the idea of the actual operation of the factory by the Diamond Glue Company. The contract then goes on to state that the officers of the Diamond Glue Company will give such personal supervision as shall be necessary from time to time in the operation of the factory, thus further showing that it was not the intention of the contract that the factory should be in charge of the Diamond Glue Company. Then the contract further provides that these officers shall give to the United States Glue Company "in the management and operation of said factory" (by the United States Glue Company) "the benefit of their experience and knowledge."

There is the further provision that the Diamond Glue Company shall control, handle and sell the entire output of the factory and that the invoices shall be stamped "Diamond Glue Company, Exclusive Sale Agent." This only means that the Diamond Glue Company shall have the exclusive right to sell the product of the factory, and this certainly does not by any necessity contemplate "doing business" in Wisconsin by the Diamond Glue Company.

It is evident, we think, that any fair reading of the contract would make it at least extremely doubtful whether the contract looked to the exercising of any actual direct control over the factory by the Diamond Glue Company. Whether it amounted at the most to anything more than an agreement by the Diamond Glue Company to advise the United States Glue Company and to furnish them a capable superintendent, whom they, however, should pay, and a covenant by the United States Glue Company to abide by the advice of the Diamond Glue Company. But, however that may be, this contract was not broken until it had been performed by both parties nearly a year and a half. During this time there was no dispute as to the proper scope of each party's

control over the factory or its product. Without a question the factory was managed and operated by the officers and employes of the United States Glue Company alone. The officers of the Diamond Glue Company did not give a single command in connection with the management of the factory or the handling, in a physical sense, of its product. (Rec., 57, 62, 69.) The United States Glue Company never requested the Diamond Glue Company to do anything more than to give advice and sell the product of the factory. (Rec., 59.) More than that, it evidently would have prevented the Diamond Glue Company from attempting to exercise any control over the factory or over its product, except as sales agent of the product. This was the construction put on the contract by both parties in common. Such construction the court will adopt.

Chicago v. *Sheldon*, 9 Wallace, 50, was a stockholders' bill to enjoin the collection of a special assessment on the property of the North Chicago Street Railway Company. The important question in the case was the construction of the ordinance giving the company permission to lay a street railway in certain streets. On this point this court said (page 54):

"In cases where the language used by the parties to the contract is indefinite and ambiguous and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling influence. The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one." See, also, *Lumber Co.* v. *Stump*, 30 C. C. A., 260, 264.

Winchester v. *Glazier*, 152 Mass., 316, 323, was a case

brought for the settlement of partnership accounts. The important question in the case was whether the allowance to one of the partners by the terms of the partnership contract of a salary of $2,500, to be paid half-yearly, apparently out of the profits, was to be made during the half years when there were no profits. It appeared that the other partner had not objected to the drawing of this salary by his partner during the half years when there were no profits. The court therefore held that the parties had put a construction on the contract which the court would follow. The opinion says:

"It is a general rule for the construction of written instruments, including deeds and contracts, statutes and constitutions, that when the language is open to doubt, and parties whose interests are diverse have from the outset adopted and acted upon a particular construction, such construction will be of great weight with the court, and will usually be adopted by it." Citing among other cases, *Chicago* v. *Sheldon, supra.*

This case is directly in point. Neither the United States Glue Company nor the Diamond Glue Company for a moment regarded their contract as giving up the factory to the control of the Diamond Glue Company. From the very first the United States Glue Company assumed actual control of the property; its officers gave the orders, its men did the work. It would be a strange theory of law that would allow the defendant, after acting on one interpretation of the contract, suddenly to turn around and take advantage of a construction of the contract to which it has paid no attention, in order to defeat an action brought in good faith on the contract.

As is evident from the cases cited above, the rule that courts will follow the construction put upon the contract by the parties themselves, is not confined to nonessentials, but goes to the very essence of the contract itself.

The case of *Topliff* v. *Topliff*, 122 U. S., 121, 131, is a good illustration. This was a bill in equity brought by John Topliff and others to restrain the infringement by Isaac Topliff of a certain patent granted in 1875 for an improvement in buggy tops. Isaac Topliff in 1870 had obtained a patent relating to the same subject and he then entered into an agreement with John Topliff and the others by which it was agreed that they should have the exclusive right to use his patent for five years, after which time all parties were to share in the use. The contract further provided that any improvements made by either party should be for the mutual benefit of all. After this contract was made Isaac's patent was found to be of no practical value, and he thereupon took out an additional patent in 1871 under which John Topliff and those associated with him manufactured up to 1879, paying Isaac the royalties provided for in the contract of 1870. In 1879 Isaac Topliff started to manufacture buggy tops, using both his patent of 1871 and John Topliff's patent of 1875. The suit was brought to restrain the use of this latter patent. This court held that the parties had by their acts construed the contract of 1870 so as to include in it the patent of 1871 instead of the patent of 1870, on which the royalty was to be paid, and also so as to regard the patent of 1875 as one of the improvements provided for in the contract, and that the court would follow the construction put upon the contract by the parties, and the bill was therefore dismissed.

VI.

The Diamond Glue Company was not doing business in Wisconsin contrary to the terms of the statute.

As stated before, the contract was made in June, 1898, two months and more before the statute that is claimed to apply took effect. The contract contained no provision looking to the breaking of any law of the state and was, when it was made, a perfectly valid agreement. Therefore, whether or not the existence of the contract before the statute went into effect was sufficient to legalize its performance in spite of the statute, in no view can the contract or its terms have any bearing on the question whether the Diamond Glue Company was violating this statute. The question of its violation cannot be determined by the *rights* of the Diamond Glue Company under the contract, but only by what the Diamond Glue Company *actually did* after the statute went into force. In other words, the contention of the United States Glue Company must be: "The Diamond Glue Company in performing this contract on which they are suing *are now* and have been violating a statute of Wisconsin. We cannot be required longer to assist in this violation. Therefore, we have a right to break the contract." It will not do for the United States Glue Company to say: "The provisions of this contract require or may require the Diamond Glue Company to do things in the future which they cannot do now without violating the statute, therefore we refuse now to proceed further with the contract." For a complete answer to that is: "You cannot know but that before the actual performance of these things becomes necessary on the part of the Diamond Glue Company, the Diamond Glue Company will have filed its charter and

complied with the other conditions of the statute, and therefore made its legal performance possible."

Yet the decision of the learned judge of the Circuit Court (Rec., 110) in taking the case from the jury proceeded solely on the ground that the *contract* gave the Diamond Glue Company *the right* to dictate the policy of the factory. That is, he held the statute infringed not by *acts* of the Diamond Glue Company, but by the mere *existence of the contract right* to do acts which if done before compliance with the statute would, he thought, be violations thereof. It could hardly be claimed that the Diamond Glue Company could be fined for the existence of this right. Yet if the company could not be fined therefor, the existence of the right is not a breach of the statute and afforded no excuse to the defendant for refusing to carry out its contract.

Suppose, for instance, the contract had provided in explicit terms that after January 1, 1901, the factory should be turned over to the Diamond Glue Company and the United States Glue Company cease to concern itself therewith, but the Diamond Glue Company should run it on joint account, could it be claimed that in such a case the United States Glue Company would have a right to declare the contract at an end on December 1, 1900, because the Diamond Glue Company had not then complied with the statute? And is the case any different because the contract grants the right to the Diamond Glue Company to assume the management at any time; which right it does not attempt to exercise? As long as the act which, it is claimed, would be a breach of the statute, is not done it cannot be said that the corporation will not have qualified for its legal performance before doing it.

The case most like the present one, on this question of the effect of a contract which gives a corporation certain

rights, on the question whether that corporation is actually doing business in a particular state, is the *United States* v. *American Bell Telephone Co.*, 29 Fed., 17.

This was a proceeding in equity. The question was whether the court in Ohio had jurisdiction over the defendant, a corporation of another state. It being necessary in order to maintain jurisdiction that the defendant should be doing business in Ohio. It appeared that the defendant, the Telephone Company, had a certain contract with the local company which gave the defendant the right, in certain contingencies, to take and operate the local lines, and it was contended that the provision showed that the defendant was doing business in Ohio. The court says (page 38):

"For its protection, the American Bell Telephone Company has, by the terms and provisions of these contracts, reserved important rights and powers, which in certain contingencies it may exercise, but which, as the plea distinctly avers, have never been actually exercised by it. The plea sets forth what has actually been done under the contracts.

"Whether the American Bell Telephone Company is carrying on business in Ohio must be determined by *what it has done, or is doing, rather than by what it may hereafter do*, in the event the local companies should make default in complying with the provisions of the contracts. The right reserved to take possession and carry on the business of telephony in Ohio, on the contingency of the local corporation's failure to observe and perform the terms and stipulations of the license contracts, certainly does not constitute a present carrying on of business by the American Bell Telephone Company, such as would bring it within the provisions even of the Ohio statutes. When the Bell Company exercises its reserved rights and powers under the contracts, and takes possession of the telephones, lines, etc., in Ohio, and operates the same through agents or officers of its own, it may then with some propriety be said to carry on its business in the state, so as to be amenable to suit here under the Ohio statute relating to suits against foreign corpora-

tions, but not before." And later on in the same opinion (page 41) we find the following: "The existence of these contracts, with the rights conferred upon the licensee or lessee, and the rights and powers, however large, reserved to the licensor or lessor, does not constitute the carrying on of business in Ohio by the American Bell Telephone Company."

This quotation expresses in apt language the correct view of this question. It seems almost too clear for argument that the existence of a contract right cannot be in itself a doing of business; that the question whether a corporation is doing business in a state at a certain date must be determined solely by what, if anything, the corporation is then doing in the state, and cannot be affected in the slightest degree by what the corporation may, according to some private contract, have the right to do.

The case of the *American Loan and Trust Company* v. *East & West Ry. Co.*, 37 Fed., 242, 245, was a suit brought to foreclose a trust deed by a foreign corporation, trustee in the deed. The trustee had not complied with the provisions of the Alabama Foreign Corporations Act, which forbade "doing any business" without such compliance. The trust deed provided that upon default in its conditions the trustee might take possession of the railway and operate the same. The court holds that such provisions in the trust deed, even after default, does not show that the trustee is doing business in Alabama unless it is further shown that the trustee is, *as a matter of fact*, in possession of and operating the railroad.

The learned judge of the court below said in his opinion that the Diamond Glue Company "had the dictation of the policy of the factory," and, therefore, was "doing business" in Wisconsin. Even if the contract, construed in the light of its performance by the parties, should be held to give

the Diamond Glue Company the right to dictate the policy of the factory, still the evidence shows absolutely without doubt that the Diamond Glue Company never did dictate the policy; that the utmost that it did was to advise the officers of the United States Glue Company as to the proper conduct of the factory. But, suppose the Diamond Glue Company had dictated the policy of the factory, this was surely not "doing business" in Wisconsin. If a Chicago company agrees to run its factory in accordance with the direction of a New York company, and does so, nevertheless this is certainly not doing business in Chicago by the New York company. The factory remains still the factory of the Chicago company as long as the Chicago company furnishes the building, the men, the material, gives from its office all directions in regard to the running of the factory, assumes the entire risk of operation, is alone responsible for the debts and expenses incurred, and has complete and absolute possession. In such a case would it not be farcial to bring criminal proceedings against the New York company for doing business in Illinois without a license from that State? Does not "doing business" in a state necessarily imply the presence in that state (for the purpose of doing the business) of some officer or agent of that corporation which is claimed to be doing the business?

The case of *Kilgore* v. *Smith*, 122 Pa. St., 48, 57, is directly in point. Kilgore, a citizen of Pennsylvania, was a member of a Maryland corporation called the Northern Hartford Packing Association. This association was incorporated for the manufacture and sale of canned and packed goods, etc. Persons becoming members of it (residents of Maryland and of Pennsylvania) subscribed among other things to these provisions: "No member of the company shall at any time or place pack any goods

which shall not be *under the control* of the board of directors of the company, and all goods packed by the members of this company shall be *subject to the control* of the board of directors of this company and for sale in such manner as they deem proper." They further agreed that at the end of the season the company should reckon up the average price obtained from such sales and pay its members 90 per cent. of this price for the goods which they furnished. In January, 1885, the company got into financial difficulties, owing Smith and others, appellees, considerable money. In consideration of this indebtedness it transferred a considerable quantity of canned goods, the subject of dispute, to the appellees. These goods were in part, at least, located in warehouses in Pennsylvania owned or controlled by the appellant Kilgore, who had packed and furnished them to the association. Upon demand of appellees Kilgore shipped some of these goods to them, but receiving no payment therefor, refused to ship others, when the appellees replevied them. The point for defense most pressed was that the appellees' vendor, the packing association, had never complied with the laws of Pennsylvania as to foreign corporations, and therefore could not be doing business in Pennsylvania and could not have acquired title to the goods when it sold to the appellees. Judgment was given for the appellees, and on appeal, was affirmed, the Supreme Court holding that as the Northern Hartford Packing Association had no capital invested in Pennsylvania, it could not be said to be doing business there, and was therefor not within the scope of the statutes.

Thompson in his work on Corporations, Vol. 6, par. 7936, says:

"The general conclusion of the courts is that isolated transactions, commercial or otherwise, taking place between a foreign corporation domiciled in one state and citizens

of another state, are not a doing or carrying on of business by the foreign corporation within the latter state; *but that these prohibitions are leveled against the act of foreign corporations entering the domestic state by their agents, and* engaging in the general prosecution of their ordinary business therein."

Scruggs v. *Scottish Mortgage Co.*, 54 Ark., 566. That was a suit brought to enjoin the sale of land under the power of sale in certain mortgages. The mortgagor lived in Arkansas and through a local broker forwarded to the mortgage company an application for a loan, which was accepted in Mississippi and the money turned over to the mortgagor's agent in Mississippi. The contract was held to be a Mississippi contract, even though it affected Arkansas land. And it was held that making such a loan was not doing business in Arkansas.

So giving advice, or even directions and commands—had and such been given—in Chicago as to the operation of a factory in Wisconsin was not doing business in the latter state. In order to show a doing of business in Wisconsin by the Diamond Glue Company it would be necessary to show that it had some agent in Wisconsin who was doing its business there. Writing letters in Chicago to another concern in Wisconsin, even had those letters contained directions that were carried out by this Wisconsin concern in its own interest—cannot possibly be held to be a doing of business in Wisconsin. And this is all that was done by the Diamond Glue Company at or about the time of the breach. For we have the positive testimony of its officers that when the United States Glue Company threw over the contract, the Diamond Glue Company *did not withdraw a single agent or employe, or a single bit of property of any nature from Wisconsin.* (Rec., 45, 57; see, also, Moorhead's testimony, p. 62.) In other words, the breach of the contract

did not put an end to any business done by the Diamond Glue Company in Wisconsin for the simple reason that in carrying out the contract *it was not engaged in business there.*

The court must ask: What did the Wisconsin legislature mean when it forbade foreign corporations to "transact any business" without compliance with the statute. The intention undoubtedly was to keep foreign corporations from entering into business in Wisconsin, not to render illegal any act of whatever nature done in Wisconsin on behalf of a foreign corporation. The statute must receive a reasonable construction.

Morgan & Co. v. *White*, 101 Ind., 413, was a suit by a foreign corporation against its agent, White, on contracts whereby the agent was to guarantee the payment of notes taken by him on behalf of the corporation. Plea was filed in abatement, alleging that the contracts were made by the corporation through its manager, S. C. Bartley, and that at the time they were made said agent had not complied with the Foreign Corporation statute of Indiana. On page 414 the court says:

"The provisions of the foregoing section in the statute are only applicable to persons who propose to engage in business within this state as agents for a foreign corporation. * * * It is claimed to be important in the section referred to that the agency contemplated was one which may have some degree of permanancy and involves transactions by an agent to conduct all the business of the corporation, who has some sort of residence or abode in the state. * * *

"The plea avers that the contracts of agency were executed in Benton County, but it does not aver that the agents who executed them for the company were 'doing business' or purposing to do business for the corporation in that county or anywhere else in the state."

"It does not appear that the appointment of the appellee's

agent was not the only transaction each ever engaged in or ever proposed to engage in, in this state; besides, we think the agents contemplated by the statute under consideration are such agents as propose to transact within this state *the business in which the corporation* is engaged, and that it has no application to persons who are engaged in appointing agents to do its business. *It may be necessary to appoint agents to do the business of the corporation, but appointing agents can hardly be said to be the business of any corporation in the sense of the statute.* This is plain from the reading of Sections 3022 and 3023, and that there might be no mistake about it, Section 3027 was enacted."

The decisions of the courts as to what constitutes doing business by a foreign corporation within a state show that it is not every act done on behalf of the corporation by its agent which will be regarded as doing business within the state. It must be some act in fulfillment of the purpose of the creation of the corporation. In other words, some exercise or attempted exercise of the corporate franchise and not some merely incidental act independent thereof. So in the leading case of *Beard* v. *U. & A. Publishing Company,* 71 Ala., 60, it was held that while the publishing company had an agent in Alabama to receive subscriptions to the newspaper which it was publishing in another state and to collect such subscriptions, "it was not doing business in Alabama." It was said (p. 62):

"There must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created to bring the case within that clause, and a railway, bank, or insurance company of foreign incorporation, performing its corporate functions within the limits of Alabama would be required to keep 'at least one known place of business and an authorized agent or agents' in this state. That would be doing business, the business or a part of it which fall directly within the purview of their corporate powers. The present case does not fall within the principle."

Sullivan v. *Timber Company,* 103 Ala., 371, was a suit

against a Florida corporation. The question in the case was whether the corporation was doing business in the county where it was sued. It appears that when the suit was commenced the company had an agent or employe in possession and care of the line of railroad it had constructed in Conecuh County, and in care of the machine which it had used in loading cars. This railroad and machine were adjuncts to the saw mill which the company had operated in another county. The operation of the mill had been discontinued and the railroad and machine were unemployed. The court says (page 380):

"The care and protection of unused property or the payment of taxes which are a charge upon the property, and the payment of which is essential to the preservation of the title to the owner, cannot be deemed as the exercise of corporate powers or franchises, nor the transaction of the business or any part thereof for which the company was created and organized.

"The real test is that in *Beard* v. *American Pub. Co., supra*,—is the corporation engaged in the transaction of business, or any part thereof, it was created and organized to transact? If it be it 'does business' within the meaning of the constitution. If it be not,—if the act it is doing or has done is not within its general powers and franchises, —it is not the business to which the constitutional requirement is directed."

So in this case—The Diamond Glue Company was not performing the objects of its incorporation in giving advice to the United States Glue Company as to the conduct of its factory. Such advice was merely incidental to the carrying out of the business for which the Diamond Glue Company was formed, which business was the manufacture, purchase and sale of glue, and the by-products of glue. (Rec., 73.)

This contention is given further point by a part of defendant's answer (Rec., 8) where it denies that the Diamond Glue Company was authorized "to superintend or agree to

superintend the construction of any factory or factories other than its own, or to act as broker, factor or sales agent." If this contention of the defendant is right—and they certainly are not the ones to assert the contrary—then, under this case, nothing that the plaintiff is alleged to have done in Wisconsin could be held to be "doing business" in the meaning of the statute. If the meaning of these words is correctly set forth in the *Beard* case—and that case has been widely cited and followed—then, giving advice, helping the other corporation to start and run its factory, sending them a superintendent and matters of that sort, however valuable to the other corporation, not being any part of the main business for which the Diamond Glue Company was organized, would not be doing business in Wisconsin.

The case of *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S., 727, throws light on this question. The constitution of Colorado provides that no foreign corporation should do "any business" in the State without having a known place of business and an authorized agent. The statute of '77 provided that foreign corporations before permitted "to do any business in this State" should file a certificate with the secretary of state designating their principal place of business and authorized agent. The Cooper Manufacturing Company had made a contract in Colorado for the manufacture of certain machinery in Ohio, and its delivery in Ohio to the purchasers. The court says:

"The contention of the defendants in error is that the prohibition against the doing of any business in the state by a foreign corporation, except upon the prescribed condition, includes the doing of any single and isolated act of business whatever. Thus broadly stated, it is clear that the interpretation of the defendants cannot be sustained."

The court then quoted from the *Utley* v. *Clark-Gardner Mining Company*, 4 Col., 369, where the Colorado Supreme Court itself says in regard to the same provisions:

"It extends only to the exercise of the powers by which it" (the foreign corporation) "may be said to ordinarily transact or carry on its business."

The court after further noting that exceptions must be made in cases of interstate commerce then says "The prohibition against doing any business, therefore, cannot be literally interpreted." The court then, further construing the provisions of the Colorado statute and constitution requiring the statement of a place of business, etc., holds that these show that the idea of the statute was to apply to concerns regularly transacting business, and says (page 375):

"To require such a certificate as a prerequisite to the doing of a single act of business when there was no purpose to do any other business or have a place of business in the State, would be unreasonable and incongruous."

In the case of the Wisconsin statute the corporation is required to file a duly authorized copy of its charter and all amendments thereto which may be made "*while it shall continue to do business therein.*" This provision shows clearly that a continuance of business is contemplated. The majority of the court in the Ferguson case based their decision, which was that the demurrer to the defense of the statute should be sustained, squarely on the non-applicability of the statute to the making of the contract, without any regard to the question of interstate commerce.

In the case at the bar the court will note that there has been absolutely no attempt made by the Diamond Glue Company to carry on its usual business in the State of Wisconsin or to maintain an establishment there. The only things done by the officers or agents of the Diamond Glue Company in the State of Wisconsin after September 1, 1898, or, indeed, after the making of the contract, consisted in occasionally meeting the officers and employes of the United States Glue Company at Milwaukee or at the factory

and advising them as to the conduct of the factory. That certainly does not constitute an attempt to maintain a place of business in Wisconsin, or to transact the ordinary business of the Diamond Glue Company in Wisconsin.

VII.

The alleged offenses against the Wisconsin Statute by the Diamond Glue Company had no connection with the breach for which suit was brought. Any right to repudiate the contract growing out of these alleged offenses was waived.

The breach of this contract, for which suit is brought by the Diamond Glue Company, was the refusal of the United States Glue Company to permit the Diamond Glue Company to make further sales from the Diamond Glue Company's Chicago office of the product of the United States Glue Company's factory. That is, the breach was the refusal to permit the Diamond Glue Company to perform that part of the contract which it had the right to perform under any and all interpretations without any regard to the laws of Wisconsin. The United States Glue Company never refused to permit the Diamond Glue Company to do any of the things which could in any way be claimed to be a breach of this statute. It accepted performance of all these matters and then refused to permit the Diamond Glue Company to sell its glue and thereby to make the commissions for which it had bargained, when such sales could be conducted absolutely independent of any and all statutory requirements of the State of Wisconsin. Then when the Diamond Glue Company sued for this breach, the defendant replied that the Diamond Glue Company had in carrying out *other* parts of this contract violated the Wisconsin statute. Seldom has a less honest defense been interposed.

What difference can it make in a suit for a breach of certain provisions of a contract which could be carried out without any possible objections as to their legality, that the plaintiff in carrying out other portions of the confessedly valid contract, had *at former times* neglected certain precautions essential, as is claimed, to the legality of its actions in these other respects? Had the plaintiff been seeking to obtain possession of the control of the factory then this defense would have some relevancy, but when all the plaintiff was asking was to be allowed to go on and carry out its part of the contract in the State of Illinois, the answer that it had in other respects violated the law of the State of Wisconsin seems entirely beside the mark.

Inasmuch as the contract was not itself invalid it would seem evident that any acts of the plaintiff, in carrying out the contract, that were illegal would only have a bearing on the obligations of the contract in so far as they might be taken to be a breach of some implied conditions. Assuming that such alleged illegal acts of the plaintiff would amount to a breach of the contract, still, like any other breach, in order to justify the defendant in rescinding, it must be taken advantage of immediately. If the plaintiff with its headquarters at Chicago, its officers being all citizens of Illinois, must be charged with knowledge of the law of Wisconsin and so held to have offended against that law in performing this contract, though in what particular it has offended it would be hard to state, certainly the defendant, a Wisconsin corporation, all of whose officers were citizens of Wisconsin, must be charged with knowledge of the Wisconsin law and that all acts of the plaintiff which are claimed to be offenses against that law were offenses at the time they were done. No act of the plaintiff was a secret from the defendant. Whatever the plaintiff did in Wisconsin was done in con-

junction with the defendant. Therefore, when, if ever, the officers of the plaintiff in visiting defendant's factory and endeavoring to help defendant to get the factory running in good order and turning out a good quality of glue, were acting in violation of the Wisconsin statute, and so made a breach of some implied condition of the contract, then it was the defendant's business, if it wished to cancel the contract, to act at once. If anything, the court should be stricter in requiring the defendant to take advantage of a breach of this sort than of one committed knowingly by the plaintiff and actually hurting the defendant. But what did the defendant do? Evidently, being first advised as to the law by the same astute counsel who represented it in the Circuit Court, it not only did not complain of these breaches, but invited them, asking Mr. Freshman at times to come up to Wisconsin and look over the factory and see what was wrong. (Rec., 85.) It accepted the advantages accruing to it from these "offenses" against the statute, and it egged on the plaintiff to commit more of them. It kept back all complaint of them or any hint that they might by any chance be regarded as offenses. It attempted to obtain more favorable terms from the plaintiff than those which it had solemnly agreed to accept, and carried on negotiations for over a month in endeavoring to get the contract recast in its favor. Thus the defendant played a game of "heads I win, tails you lose," and threw dust in the eyes of the plaintiff's officers as to the claimed illegality of some of its acts while seeking to profit by negotiations which implied the complete legality of the acts of both parties.

Certainly no principle of law can justly sanction such dealing. Certainly the Wisconsin legislature in enacting their statute did not intend that it should be used as a cloak for fraud.

The only act of the Diamond Glue Company which in any way even resembled doing business in Wisconsin was sending their superintendent to the factory in July, 1899, to assist the United States Glue Company's superintendent for a few days. If this friendly act was so illegal as to absolve the United States Glue Company from all its obligations under the contract, they ought then and there to have refused to have any further dealings with violators of law, instead of continuing their contract relations for four months thereafter.

It is well settled law that if a party to a contract has a right on account of some act of the other party to repudiate the contract, such right is lost by calling for further performance of the contract, or doing any act inconsistent with repudiation of the contract or which would necessarily imply the continuance of it. So it is held in *Weeks* v. *Robie,* 42 N. H., 316, that any act amounting to ratification by one entitled to repudiate after a knowledge of the facts and circumstances of the case makes repudiation impossible

Herman in his work on Estoppel, Vol. 2, Sec. 1039, says:

"A man who has his option whether he will affirm a particular act or contract, must elect either to affirm or disaffirm it altogether; he cannot adopt that part which is for his own benefit and reject the rest. * * * He cannot treat a contract as subsisting and afterwards avoid it."

"§ 1040. Among the rules which have become axiomatic is one that a party must be consistent and not contradictory in the positions which he takes. In the language of Lord Kenyon, he must not 'blow hot and cold at the same time.' * * * If a voidable contract, or other transaction, is voluntarily acted on with a knowledge of all the facts, in the hope that it may turn out to the advantage of a party who might have avoided it, he cannot avoid it, when after abiding that event, it has turned out to his disadvantage. * * *

"§ 1043. Where a party to a contract, which might be impugned on the ground of fraud, knowing of the fraud, nevertheless elects to treat the transaction as a binding contract, he thereby loses his right of rescinding it; for fraud only gives a right to avoid or rescind a contract. A party cannot retain the benefit of a transaction and at the same time repudiate it as null and void."

"§ 1046. Where, by reason of a breach of conditions, a lease becomes forfeited, and the lessor is entitled to recover possession, he waives that right by the acceptance of rent, he cannot accept the rent and at the same time claim a forfeiture of the lease."

So in *Lawrence* v. *Dale*, 3 John. Ch., 23, 42, it is said:

"If the law allows a party to abandon contracts while *in fieri*, he ought at least to act promptly and decidedly, on the very first discovery of the breach. *If he negotiates with the party afterward and permits the work to go on he certainly waives all right to abandon.*"

"A municipal corporation will not be allowed to license an act to be done, and then collect the penalty for the doing of it as for an illegal act. *Volenti non fit injuria.*" *Genoa* v. *Van Alstine*, 108 Ill., 555.

It should be remembered that there is not a scintilla of evidence in the case to show that at the time the defendant refused further to carry out the contract, or for some time previously the plaintiff was doing a single thing of any nature whatever, in Wisconsin, in performance of the contract.

Supposing the Wisconsin statute instead of merely providing that it should go into effect September 1st, had provided that all contracts made before September 1st, calling for performance after that day, should be taken to be subject to the condition that the foreign corporation should, before doing anything in Wisconsin after September 1st, comply with the statute, and that if the foreign corporation did acts in Wisconsin without complying with the statute the other party to the contract might abrogate it.

Can it be supposed that in such case the said other party might wait until a year and three months after the statute went into effect, and some five months after any act by the foreign corporation in Wisconsin that could be construed as doing business, before abrogating the contract? Yet such a statute as we have supposed merely expresses all that the Circuit Court decided the statute in question implied. There is no illegality here about either the contract itself or the consideration for the contract. The only claim is that the performance of certain of its provisions, as the court construed them, was illegal after September 1, 1898.

Another view may be taken of this matter; the situation of the parties was this: The contract was valid. At the utmost all the plaintiff was called upon to do was to furnish plans, to give advice and information as to the operation of the factory, to sell the products of the factory—none of which were to be done in Wisconsin, and to operate the factory—which might be done in Wisconsin. Now the plaintiff is suing concerning the breach of the agreement that it should sell the glue, not on the agreement that it should operate the factory, so it is not attempting to enforce the agreement that it should operate the factory. That agreement has been lost sight of by both parties, or more probably was never intended literally by either party. Now, it is only this provision—that the plaintiff should operate the factory—whose performance would in any view violate the statute. That is the only act provided for in the contract which would constitute a *"doing business"* of any sort in Wisconsin. Yet, the plaintiff has never attempted to operate the factory, nor has the defendant evinced any desire, or even willingness that the plaintiff should operate the factory. How, then, can the plaintiff be said to have offended against the statute when the defendant has waived perform-

ance of the only provision of the contract which has any relation to the terms of the statute? If the defendant can waive performance by the plaintiff of the provision of the contract that it should have the management and operation of the factory, which we do not think can, or will be denied, it could certainly waive an implied provision that the plaintiff should comply with the statute in order to qualify itself for the management and operation of the factory which it is not expected to undertake. It would be absurd to allow the defendant to escape from a contract because the plaintiff was not ready to do something which the defendant not only did not ask the plaintiff to do, but showed by its conduct that it was unwilling the plaintiff should do.

There are undoubtedly a good many cases of which the above mentioned case of *Aetna Insurance Co.* v. *Harvey, supra*, is a sample, that hold that where a contract is made contrary to law the defendant may set up that fact in defense of a suit brought on the contract, even where he has himself acted under it. But those cases have no bearing on this suit. The reason for their decision is that such a supposed contract is *no contract at all*, being illegal, and therefore no rights can arise under it. Here the *contract was valid*. The law, it is said, subsequently gave the United States Glue Company the right to abrogate it. It did not exercise this right until the facts on which it was founded ceased to exist. During five months thereafter it treated the contract as binding and required its performance by the plaintiff; by doing so it lost its right, if it ever had it, of abrogation.

Let us look at the facts in relation to the doings of the Diamond Glue Company in November and December of 1900. The Diamond Glue Company had its headquarters in Chicago. It received reports from the United States

Glue Company's factory in Wisconsin twice a week. These reports showed the amount and quality of the glue and grease manufactured. Except from these reports it had no record or knowledge of the work of the factory. It had no control during this period between July and November (the only time the factory was in operation) "over the prices paid for the labor of that factory, over the character, quantity or prices of material or coal used, or over the nature and amount of the sundries charged." (Mr. Morron's testimony, Rec., 46.) Whatever the Diamond Glue Company did under this contract, it certainly did not operate the factory and so do business in Wisconsin.

It gave advice freely as to any of these matters when required or requested by the United States Glue Company or its officers; it stood ready, doubtless, at any time to carry out any part of the contract which the United States Glue Company might desire to have carried out; before doing anything that involved the transaction of business in Wisconsin, it is only fair to presume it would have filed its charter with the secretary of state. But in November and December of 1900 the Diamond Glue Company was *not doing* a single thing which required the consent of the State of Wisconsin, or which in any way came within the purview of Section 1770b, and, as we have shown, any former alleged violations, so far as they could be claimed to give the defendant the right to repudiate the contract, were waived.

We have established, we think, the following propositions:

That Section 1770b of the Wisconsin Statutes of 1898 is unconstitutional because it attempts to impose conditions on the making of contracts and doing business in Wisconsin

by partnerships and voluntary associations contrary to the provisions of the United States Constitution, and the statute being in so far unconstitutional, it is impossible to enforce the remainder of it without altering the legislative intent.

That the amendment of 1899 (made after the execution of the contract) did not make the statute constitutional, inasmuch as it still left it to include all volunary associations for business or pleasure (with certain limited exceptions) that were not ordinary partnerships.

That said Section 1770b, even if valid, has no bearing on the present suit because the contract on which suit is brought was executed before this statute went into effect—although, indeed, after its enactment—and therefore the obligations of the contract are protected by the United States Constitution.

That supposing the statute to have been invalid until the amendment of 1899 and then to have become valid for the first time, the rights growing out of the contract would be excepted from its operation, because in that case the contract was made before a valid statute was either enacted or went into force.

That all acts done by the Diamond Glue Company in execution of the contract after September 1, 1898, were acts in furtherance of interstate commerce and therefore were beyond the authority of the state legislature.

That laying all constitutional questions aside, the Diamond Glue Company at no time was doing any business in Wisconsin contrary to the provisions of the statute.

That even if the Diamond Glue Company was held at one time to have infringed the statute in the performance of this contract, thus giving, as it is claimed, the United States Glue Company the right to repudiate the contract, still,

that right, not having been exercised at the time of the breach of the statute, if any, by the Diamond Glue Company, was waived and could not afterward be taken advantage of by the United States Glue Company.

We respectfully submit that each of these propositions is true. But if only one of them be established then the Circuit Court erred in its application of the Wisconsin statute, and in directing a verdict for the defendant.

VIII.

The Diamond Glue Company in its dealings with other corporations did not break its contract with the United States Glue Company.

The judge of the Circuit Court, in his brief opinion given in support of his direction to the jury to find for the defendant, speaks as follows (p. 111):

"I have been * * * quite strongly impressed with * * * the showing of the doing of business by the plaintiff, notwithstanding the contract, with other parties, which, it seemed to me, would be a business necessarily in antagonism to that of the defendant's in this case, and, if so, that of itself would be a breach on their part which would authorize the setting aside of the contract by the defendant."

And he proceeds to say further that he does not rely on this; that it makes no difference to his ruling.

All the record shows on the subject of dealings with other manufacturers of glue is contained in Mr. Morron's testimony on cross and re-direct examination, pages 50, 52 and 53 of the printed record. From this it appears (Rec., 52) that the Diamond Glue Company, at the same time it

was acting as agent for the United States Glue Company, also sold glues as agent for the Foerderer factory in Philadelphia and the Fischer factory at Gowanda, New York. It also appears that the Diamond Glue Company had contracts with the companies operating these factories. That was all the testimony on the subject of the dealings with other manufacturers, and even from this testimony it appears that more of the United States Glue Company's glue was then sold than of either of the others.

It clearly appears from the evidence, however, both that the United States Glue Company knew that the Diamond Glue Company had contracts similar to theirs with other manufacturers and that the Diamond Glue Company expressly refused to contract not to sell other hide or calf glue. On June 22, 1898, six days before the execution of the contract in suit, Mr. Trostel, the vice-president of the United States Glue Company, wrote to the Diamond Glue Company (Exhibit 2, p. 74), enclosing a proposition for a contract between the two companies. The letter also contained these words:

"Knowing as you do that we are novices in the glue business, you will agree with us that it would be of material aid to us in getting up a contract if you would give us an insight into the contracts you have with *Foerderer and others with reference to the running of their glue factories,* which favor you will no doubt grant us."

Nothing could show more explicitly the fact that the United States Glue Company knew that the Diamond Glue Company had similar arrangements with other companies to that which was contemplated with the United States Glue Company.

The proposition referred to in this letter of Mr. Trostel's (Rec., 75) contained this paragraph:

"During the life of the agreement, beginning as soon as our factory is ready for operation, you are to refrain from making *or handling* either hide or calf glue."

Taking the place of this paragraph we have in the contract, actually executed six days later, the agreement "to refrain from *manufacturing* either hide or calf glue at any of their factories." In other words, the United States Glue Company asked the Diamond Glue Company to promise to give up selling other hide or calf glue and the Diamond Glue Company *refused* to make such a promise. Since it did not make the promise it can hardly be said to have broken it.

IX.

Even if the plaintiff were not entitled to recover damages for the defendant's refusal to abide further by the contract, nevertheless the instruction given to the jury was wrong, for the plaintiff showed a cause of action for the value of services rendered by it to the defendant.

It was admitted that the contract sued upon was of itself valid when made. It was not claimed there was anything illegal in the acts of the Diamond Glue Company in furnishing advice to the United States Glue Company, in drawing plans for its factory, in selling its produce. Therefore, even if the defendant was at liberty, as held by the Circuit Court, to declare the contract at an end, the plaintiff was then entitled to recover under its amended complaint (Rec., 26) for the value of the services it had rendered as on a *quantum meruit* at common law. For these services were rendered in part before September 1, 1898, when under no possible construction was the plaintiff in any default, and other services were rendered outside of the

State of Wisconsin in selling the United States Glue Company's glue and grease, and therefore could in no way be a violation of the Wisconsin statute.

The amended complaint asked both for damages for the breach of the contract and also for commissions earned in the sale of the glue and for the value of services rendered to the United States Glue Company. The complaint states there was due as commissions $1,698.48. The answer admits that there are unpaid commissions amounting to $1,639.13 (Rec., 15), but states they were not due or payable That these commissions were earned is shown in the evidence by the sales, a list of which is found on pages 103 to 106 of the printed record. Certainly the plaintiff made out a cause of action and substantiated its claim for commissions earned. Under the evidence it was a mere matter of computation from these sales to arrive at the right amount. If this amount, or any of it, were for any reason not due, it did not appear from the plaintiff's evidence and it is for the defendant to show. From page 52 of the printed record it appears that the Diamond Glue Company had sold for the United States Glue Company between July 26 to December 11, 1899, glue amounting to $18,167.90, which shows that the Diamond Glue Company became entitled to commissions for the sale of such glue alone to at least $1,816.79. Besides this a large quantity of grease was sold, as appears from Exhibit 41. (Rec., 103.)

The record shows that the officers of the Diamond Glue Company made many trips to Milwaukee before September 1, 1899, on behalf of the United States Glue Company, gave it advice freely, drew up plans for it, using the time of one of its men for about a month, and did various other acts in fulfillment of the contract, which in no way were violations of the Wisconsin statute. The Diamond Glue

Company was certainly entitled to recover the value of these services on the showing made, so that in no point of view of the law is there justification in fact for the instruction given to the jury to find for the defendant.

We respectfully submit that the judgment of the Circuit Court should be reversed and the cause remanded for a new trial.

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